IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE JAMES BARNARD, et al, Appellants v. UNITED STATES OF AMERICA Appellee	NO. 17746

CONSOLIDATED BRIEF OF APPELLEE

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JURISDICTION

These are five (5) timely appeals from respective judgments of conviction following trial upon an indictment for violations of Title 18 U.S.C. Section 1341 (Mail Fraud) and Title 18 U.S.C. Section 371 (Conspiracy) entered in the United States District Court for the District of Oregon.

Jurisdiction of the District Court was invoked under Title 18 U.S.C. Section 3231 and jurisdiction on appeal has been invoked under Title 28 U.S.C. Section 1291.

EXPLANATORY NOTE REGARDING REFERENCES TO TRANSCRIPT OR EXHIBITS

In light of the many references to a voluminous transcript and numerous exhibits required in support of Appellee's Statement of the Case and Argument, appellee has collected the majority of such references in an Appendix to this Brief.

The Appendix is keyed to the Statement of the Case and Argument by reference number, e.g., 1,2,3,4,etc. The appropriate reference number appears where transcript references would ordinarily appear.

Upon locating the appropriate reference number in the Appendix, the reader is provided with the collected transcript and exhibit references pertaining to the facts set forth in either the Statement of the Case or Argument.

Since there is a Transcript of Record (3 volumes), a Supplemental Transcript of Record (2 volumes), a Second Supplemental Transcript of Record, and a Supplemental Transcript of Record containing Transcript of Hearing after Remand, and since the pagination is not consecutive throughout, the following abbreviations will be employed where appropriate: Record - RI, RII, RIII, followed by page number and line; Supplemental Record - Supp. RI,

Supp. RII, followed by page number and line; Second Supplemental Record - 2 Supp.R, followed by page number and line; Supplemental Record, Transcript of Hearing after Remand - Tr. Hrg., followed by page number and line.

STATEMENT OF THE CASE

Appellant Philip Weinstein was found guilty by a jury on all counts charged in the indictment, viz: Counts VI, VII and VIII (Mail Fraud) and Count IX (Conspiracy).

Appellant George James Barnard was found guilty by a jury on seven of the nine counts charged in the indictment, viz: Counts I, II, III, IV, V, VI (Mail Fraud) and Count IX (Conspiracy).

Appellant Raymond Henry Knippel was found guilty by a jury on both counts charged in the indictment, viz: Count III (Mail Fraud) and Count IX (Conspiracy).

Appellant William Mack Lassiter was found guilty by a jury on both counts charged in the indictment, viz: Count III (Mail Fraud) and Count IX (Conspiracy).

Appellant John Norris Barnard was found guilty by a jury on all counts charged in the indictment, viz: Counts VII and VIII (Mail Fraud) and Count IX (Conspiracy).

The basis of the conspiracy, and the substantive charges of Mail Fraud, appears from a series of staged collisions in Portland, Oregon, and the subsequent assertion of

claims for personal injury and property damage in order to obtain money from insurance companies upon the representation that the collisions had occurred through the negligence of another and without fault on the part of the claimants. The conspiracy began in 1958.

The indictment was in nine counts, eight of Mail Fraud, (Counts I through VIII inclusive), and one of Conspiracy, (Count IX). (RI,1) At the trial testimony was adduced with respect to six collisions, of which five were the basis for the substantive counts, that took place on the following dates: August 18, 1958, (Counts VII, VIII); September 11, 1958, (Count VI); October 16, 1958, (Counts IV, V); January 17, 1959; September 5, 1959, (Count III); and February 16, 1960, (Counts I, II).

From the following facts developed at trial, the nature, extent and duration of the scheme are apparent. They have been set forth, so far as possible, in chronological fashion in order that the pattern of conduct be more readily discerned.

Charles Giegerich, a close friend of George Barnard, was brought up from California to participate in a staged collision. [1] He went to work for Wolfard Motor Co. on August 16, 1958, and on August 18, 1958, he struck another vehicle from the rear while driving his employer's car, the basis for Counts VII and VIII.[2] The other vehicle was driven

by Ronald Allison.[3] The investigating officer ascertained that the point of impact was 40 feet back from the intersection and that the Allison vehicle moved only 13 feet after the impact.[4] Allison had no explanation other than to say he was waiting in that position for a red light, although there was no vehicle in front of him.[5] The investigating officer also found "a friendliness amongst the participants which is lacking in the normal accident," and observed that the steering wheel was bent down, that is, forward from the driver's position and pushed down so that the wheel was no longer circular.[6] Allison told the investigating officer that his chest hurt and the steering wheel had been pushed down as a result of the collision.[7] At the hospital he reported that he had hit himself on the steering wheel and that his chest ached slightly; however, upon initial examination his chest was found to be perfectly normal.[8] The examining doctor testified that he would not expect to find such a lack of physical evidence in a patient who had come into contact with the steering wheel following a rear-end collision sufficiently sharp to break the steering wheel.[9]

In applying for an Oregon driver's license, Giegerich gave as his residence address 334 S.E. Grand Avenue, which was in fact the business address of Tonkin Motors.[10] At the scene of the collision Giegerich gave his residence address as 12536 S.E. Lincoln Court to the investigating officer, as he had done for employment records at Wolford Motor Co. [11]

This was the home of a Mrs. Denny at which Giegerich had never stayed, although he did park his car there, with the assistance of George Barnard who later came and got the car for Giegerich.[12] On his admission to the hospital following the collision Giegerich stated his residence address as 12536 S.E. Lincoln Court, although the typed record showed his address as 125 S.E. Lincoln.[13] The latter was a vacant lot.[14] In talking with an adjuster for the insurance company investigating the collision he gave his residence address as 1633 S.E. Hawthorne, yet this was the business address of a print shop.[15] Giegerich at first reported that he had an accident while on his way home, but later stated that it occurred while he was on business for his employer.[16]

John Barnard, George Barnard's brother, was a passenger in the Allison vehicle, and on two earlier occasions had been a client of Weinstein.[17] In both these instances, John Barnard asserted a claim by reason of personal injuries sustained while in the employ of Ross Island Sand & Gravel Co.[18] It was there that he had met Allison and the two had become close friends.[19] The latter of the two cases had been finally concluded May 1, 1958.[20]

While Weinstein undertook the representation of John Barnard, as well as that of Allison and Page (the other passengers in the Allison vehicle), he did not do so until several days after August 20, 1958.[21] Prior to assuming that

representation Weinstein issued to John Barnard five, and perhaps seven checks, four of which were executed even before the collision occurred.[22] It was not the standard practice among attorneys in the Portland area to advance monies to clients before they became clients.[23]

These were the first of a long series issued to John Barnard during the pendency of his claims by Weinstein, who also issued a series of checks to Allison.[24]

Weinstein filed complaints against Giegerich on behalf of Allison, John Barnard and James Page and served them by mail upon the Motor Vehicle Department for the State of Oregon; and also forwarded a copy of the Summons and Complaint by registered mail to Giegerich at his home address in Santa Fe Springs, California, the address at which George Barnard was accustomed to visit and at which he received funds via Western Union on June 3, 1960.[25] All three law suits were settled in October 1959.[26]

George Barnard had for some time attempted to get Esther Howerton to participate in a staged collision and, although unsuccessful during the earlier period with Giegerich, finally succeeded with the help of David Boisjolie.[27] George Barnard convinced Sonny Deegan to participate in the same staged collision by assuring him that others, in "prior phony accidents" had made large recoveries and there was no danger of being caught.[28] The collision was set up for and

took place on September 11, 1958, and was the basis for substantive Count VI.

On July 9, 1958, George Barnard, using the name James Barnard, purchased a 1941 Chevrolet (Oregon License 2G6777) from Field's Chevrolet.[29] On August 16, 1958, Weinstein issued a check to George Barnard in the sum of $100 and George, (who was in the habit of buying many old cars per year - in 1955 and 1956 he averaged ten per year from Field Chevrolet alone), on August 21, 1958, purchased a 1951 Oldsmobile (Oregon License 3B5834), again from Field's Chevrolet, paying $100.[30] He then gave the Oldsmobile to Howerton and told her to obtain $40,000 insurance coverage, for which he provided the money and which was obtained on September 5, 1958.[31]

On September 11, 1958, a 1951 Oldsmobile (Oregon License 3B5834) struck a 1941 Chevrolet (Oregon License 2G6777) from the rear in a collision that four of the five participants testified was planned with George Barnard.[32] The Oldsmobile was driven by Boisjolie but contained Howerton as the passenger who was to become the putative driver.[33] The Chevrolet, which Deegan acquired from George Barnard, was driven by Mrs. Deegan and contained Deegan and Darrell Saunders as passengers.[34] Immediately following the impact, Boisjolie slipped out from behind the wheel and went to join George Barnard, who was waiting at the scene, and Howerton slid over into the driver's position.[35]

The morning after the collision, the Deegans met with George Barnard who told them to go see Weinstein as the attorney with whom everything had been prearranged, (although Weinstein later told Deegan to say that he had been referred by an Irene Blair).[36] Deegan then went to see Weinstein at his office and gave him the details of the collision.[37] Later the same day Deegan saw Weinstein at Providence Hospital,to which the participants had been removed after the collision, and first met him in Saunders' room where he saw Weinstein give Saunders "two or three hundred dollar bills."[38] Shortly thereafter, Deegan again met Weinstein in the hospital parking lot where he showed Weinstein the Chevrolet used in the collision and was advised by Weinstein that since it was undamaged he should bash it into a tree, which he did with the aid of George Barnard.[39] The next day Deegan visited Weinstein's office, told Weinstein he had mashed the car up, and was advised by him to get rid of the car, for photographs taken at the scene revealed that it had not been damaged in the collision.[40]

Neither of the Deegans nor Saunders were injured in the collision but were told by Weinstein how they should perform so as to indicate that they had been.[41] After a visit to the doctor on one occasion Mrs. Deegan was asked how the visit went by Weinstein and she replied "I thought I did as I was told" and Weinstein made no reply.[42] Weinstein also made many advances of money to the Deegans, as well as to Saunders, during the time their cases were pending.[43]

Weinstein filed complaints on behalf of both the Deegans and Saunders, served them by mail on the Motor Vehicle Department for the State of Oregon, and eventually settled all three.[44] It was George Barnard, however, who came to the Deegans' home to tell them their settlement check had arrived.[45] After settling accounts with Weinstein the Deegans had $840, of which $800 was paid to George Barnard, who was waiting for them in a restaurant across the street from Weinstein's office, George having earlier paid the Deegans $500 for their share of the proceeds.[46]

After Weinstein filed the action for Saunders, but before settlement, Weinstein purportedly obtained a general power of attorney from Saunders, (which was not acknowledged), before the latter left the Portland area.[47] At the time Saunders' case was settled Weinstein signed Saunders' name to the check and release, (including witnessing that Saunders had signed in his presence, although he was not in fact there), as closely as he could to the manner in which Saunders would sign.[48] While Weinstein testified that Perrin, the insurance adjuster, knew that Saunders was not in Portland and that he knew of the power of attorney, Perrin flatly denied this.[49] If the insurance company had known that Saunders was not the actual signee of the release, or endorser of the check, it would have required a certified copy of the power of attorney.[50]

Boisjolie, the actual driver of the car which rear-ended the Deegan car on September 11, 1958, was employed by Howard Auto Supply Co. during 1958, and one of his fellow employees was a Lewis Swertfeger, aka Scott.[51] George Barnard attempted to get Boisjolie to participate again, but the latter refused and instead made arrangements for Scott, (as he was then known), to meet with George Barnard, who outlined the plan for another staged collision.[52] George Barnard convinced Scott to participate and on October 16, 1958, Scott drove a Howard Auto Supply Co. vehicle which struck, from the rear, a vehicle driven by Keith Rose, in accordance with the plan outlined by George Barnard assisted by Raymond Knippel.[53]

Boisjolie also recruited Keith Rose, made arrangements for him to meet George Barnard and, assisted by George Barnard outlined the plan.[54] In soliciting the participation of Rose, Boisjolie told him that "we got it set up, a syndicate set up" and explained that these were rear-end collisions in which the persons involved would claim back injuries and "split fifty-fifty with the syndicate when they got a settlement."[55]

Saunders, the passenger in the Deegan car on September 11, 1958, also met with Boisjolie and Rose, talked of "other instances," (as had Boisjolie earlier), and assured Rose that he would see to it that Rose made the performance.[56] It was the same Saunders who recruited Gordon McCoy as a passenger for the Rose vehicle, after relating the phoniness of the

earlier collision, and arranged for his meeting with George Barnard.[57] It was also Saunders who brought McCoy and Dennis Dunham, (another passenger in the Rose vehicle), to the Rose vehicle prior to the collision and who advised that George Barnard would be at the scene to see that things went right; and George was there.[58] The collision, which three of the five actors identified as staged, occurred as planned on October 16, 1958, and was the basis for substantive Counts IV and V.[59]

For his participation Scott received $500 from George Barnard, at least $300 of which was paid to Scott on October 17, 1958.[60] In October of 1958, some time after the 17th, George Barnard went to Weinstein's office and obtained money in excess of $100.[61]

While planning the collision and recruiting the personnel therefor, George Barnard had told Scott, Rose and McCoy that the lawyer to handle the claims had been "lined up" and that his name was Phil Weinstein, and handed McCoy one of Weinstein's business cards and that of the Orthopedic and Fracture Clinic.[62] Upon arrival at the hospital following the collision McCoy arranged, through a nurse, to call Weinstein, handing her the card George Barnard had given him.[63] However, when Weinstein arrived at the hospital he told McCoy that he was the attorney for Rose, having been contacted by an in-law or friend of Rose, and asked McCoy if he would like

an attorney.[64] Yet Weinstein, upon visiting Rose at the hospital, said "he was representing the other boys" and asked Rose if he wished representation.[65] Later Weinstein told Rose, as well as McCoy, to say that a Bob Svilar had sent Rose and McCoy to Weinstein.[66]

Saunders, who had earlier explained to the actors how to behave upon arrival at the hospital, came to visit both Rose and McCoy at the hospital, immediately after the collision, told Rose to keep quiet, that all was well and advised McCoy to speak only to Weinstein.[67]

A month or six weeks after accepting the cases of Rose and McCoy, Weinstein referred them to Ben Gray, his associate who occupied the same office.[68] Weinstein made four or five advances of money to Rose before the referral, and he continued to advance funds to Rose after the referral.[69] He also advanced sums to McCoy, both before and after the referral to Gray, Gray having told McCoy to see Weinstein for money.[70] Before referring McCoy and Rose to Gray, Weinstein told Rose that there was "some talk of this accident being a phony or a fixed accident."[71]

Actions were filed and claims asserted, by Gray on behalf of Rose and all his passengers and the Rose action was actually brought to trial.[72] During the trial Scott met with George Barnard, his brother John, (a passenger in the collision of August 18, 1958), and Boisjolie.[73] At this

meeting, George Barnard told Scott what to say at the trial and also that "if anybody should start to talk or open their mouths or get carried away" that he might have to use a revolver to keep them quiet.[74]

On September 23, 1959, the day the jury was deliberating in the Rose and Scott actions, George Barnard met with Scott, Boisjolie and Knippel, told them that Knippel and Scott were to collect his share of the money received from the judgment and said they were to wait for Rose to get his check, (they would know the check was there because "the lawyer would call"), then take him down and cash the check.[75]

Aetna Insurance Company paid Rose, as a result of the judgment; as did State Farm Insurance Company, for the same staged collision, and both companies settled with McCoy.[76]

Deegan first met Knippel about three months after the collision of September 11, 1958, when George Barnard introduced them at the Clock restaurant, and at that time he overheard George and Knippel discussing a collision which was in the planning stage.[77] Howerton, the owner of the other car involved in the September 11th collision, introduced Conrad Kerr to George Barnard, who in turn introduced Kerr to Knippel and a James Barnard.[78] (a)

(a) Although Kerr denies that the collision was planned, and asserts that he first met Knippel and James Barnard the day of the collision, the testimony of Deegan, (characterized by the trial court as "obviously . . . . a

Kerr drove a car, in which Knippel and James Barnard rode as passengers, that was struck from the rear on January 17, 1959, in the collision earlier forecast at the Clock.[80] Kerr's vehicle was struck by an automobile driven by Alfred Wooldrige, (although owned by George Wallace Buick Company), and insured by Pacific Indemnity Company, which company settled the claims asserted by Kerr, Knippel and James Barnard in the actions filed January 17, 1959; as National Farmer's Union Property and Casualty Company, which insured Kerr, paid out on the claims asserted by Kerr and Knippel following this same collision.[81]

Wooldrige, who met Weinstein before he did George Barnard when he retained Weinstein to represent him concerning an earlier and apparently accidental collision, was approached by George Barnard to participate in a staged collision and directed by George Barnard to select a car from a big car dealer that would have sufficient insurance coverage "to handle the deal."[82] On January 17, 1959, Wooldrige received final instructions from George Barnard and Knippel

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reluctant witness"), and that of the investigating officer, (Walker), indicates that Kerr was mistaken in each instance - a conclusion supported, in part at least, by Kerr's own statements. The reasonable conclusion from the combined testimony of Kerr and Deegan (each a Government witness), is that Howerton introduced Kerr to George Barnard late in November 1958 and that shortly thereafter George Barnard introduced Kerr to Knippel. Deegan apparently sat in on a meeting at the Clock restaurant late in November 1958 at which George Barnard, Knippel and Kerr, having already met, discussed the forthcoming collision. 79/

detailing the manner in which the collision was to occur and identifying the other vehicle to be involved.[83] George Barnard again was at the scene of the staged collision and issued instructions as to post-collision performance.[84]

After the collision Kerr and Knippel first contacted Weinstein for representation, but Weinstein referred them to his associate, Gray, who filed actions on their behalf, and on behalf of James Barnard.[85] Weinstein made the referral to his associate, with whom he split the attorney's fee, because he was already representing Wooldrige on another matter, nevertheless, Gray never advanced any monies to Kerr but instead sent Kerr to Weinstein.[86] The only times that Kerr saw Weinstein was when he went to receive money, (on some four or five visits to Weinstein he received $1100 which was deducted from the recovery upon settlement of the case), and Knippel, too, received money from Weinstein during this period.[87]

Shortly after the collision, (although there is a conflict in Wooldrige's testimony in this regard, it would appear to be after March 23 and before March 30, 1959), Wooldrige left Portland, Oregon, and proceeded to Council Bluffs, Iowa, (via Cheyenne, Wyoming), arriving in April 1959 and not returning to Portland until the time of trial.[88] George Barnard, who had paid Wooldrige $75 to $100 prior to

the collision, gave Wooldrige the car by which he left town following the collision, although George Barnard tried to talk him into participating in another one before he left.[89]

Wooldrige took with him to Council Bluffs a Jackie Havel, whose mother, a Vancouver-Washington policewoman, subsequently learned of Wooldrige's whereabouts from a letter her daughter sent from Council Bluffs on May 5, 1959.[90] While enroute to Council Bluffs, Wooldrige stopped at the Holiday Motel in Cheyenne and called Weinstein, (George Barnard had no telephone), and on March 30, 1959, received $50 by Western Union in response to his request therefor.[91] This was the last of several occasions upon which Wooldrige had obtained money from Weinstein, and while the amounts, (some $205 in addition to the $50 Western Union money order sent to Cheyenne), Wooldrige had received were supposed to be deducted from a settlement of the earlier "legitimate accident," Weinstein had told Wooldrige, on the occasion of his last visit to Weinstein's office before leaving Portland, that he "didn't have much of a case" and that Wooldrige would not "have a very good chance."[92] Wooldrige never contacted Weinstein, or anyone else in Portland, after leaving Cheyenne and up to the time of trial had not repaid Weinstein any money.[93]

In March 1959, Wooldrige, in endorsing one of the checks which Weinstein had written to him, placed thereon the address 8828 North Dwight. (Ex. 443C) Some time in October 1959, Knippel appeared at that address, asked for Wooldrige, and was told that Wooldrige's whereabouts was not known but that he had been going with a "Jackie" whose mother worked on the Vancouver Police force.[94]

Mrs. Havel received an inquiry from Knippel, "along the first part of November" 1959, concerning the whereabouts of Wooldrige, and after that, ("oh it must have been two or three months later"), received a telephone inquiry from a gentleman who said he was an attorney, "Mr. Weinstein of Weinstein & Gray."[95] Mrs. Havel told the party who phoned that Wooldrige was living in Council Bluffs, Iowa.[96] On April 5, 1959, Mr. Mautz, the attorney who originally handled the defense of Wooldrige, sent a letter to him c/o Weinstein in which he stated that there was a serious question whether or not "you have not violated and repudiated any such coverage by your failure to comply with conditions of insurance policy,"[97] and Gray was later advised that the carrier was going to refuse the defense of Wooldrige for failure to cooperate in that all efforts to locate him had proven fruitless. At the time of trial, during the cross-examination of the Government's witness Moore, who succeeded Mautz as the attorney handling the Wooldrige defense, Weinstein produced

both the letter, and the opened envelope in which it had come to his office.[98] On December 16, 1959, Weinstein wrote Moore advising him of Wooldrige's address and Moore was then, for the first time, able to communicate with Wooldrige.[99]

Mr. Waterman, claims manager for Pacific Indemnity, handled the claims of Kerr, Knippel and James Barnard made pursuant to the collision of January 17, 1959, and during the course of his handling the claims he also attempted to ascertain Wooldrige's address from Weinstein, who stated that he would advise Waterman when he learned Wooldrige's address.[100] Weinstein at first advised Waterman that he did not know of Wooldrige's whereabouts, then, on April 9, 1959, told Waterman that Wooldrige was in Idaho but would return.[101]

Anna Kimmel [b] lived with Patricia DePlois and it was at the latter's home where Kimmel first met Knippel, (the passenger in the collision of January 17), and George Barnard on the evening of September 5, 1959, when the collision planned for that night was discussed.[102] From the DePlois home Kimmel, George Barnard, DePlois and Knippel went first to Scotty's restaurant, where they were joined by William Mack Lassiter, (a close friend of Knippel), and then to the Nabisco Company.[103] The five stayed at the

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[b] At the time of trial she had married and her testimony appears under the name of Stewart.(RIII 1893/6-12)

Nabisco plant long enough for George Barnard to explain the details of the forthcoming collision and take them to the contemplated scene.[104] After returning to Nabisco the five returned to Scotty's where George Barnard told Knippel and Lassiter to break the front seat of the DePlois vehicle.[105] Knippel and Lassiter took the DePlois car away and when they returned with it the front seat was broken back in such a fashion that Kimmel, sitting in it, could not see out the front windshield as she and DePlois proceeded to 32d and Dekum to participate in the collision.[106]

Donald Johnstone sold a sewing machine to Lassiter's wife on July 11, 1959 and some time thereafter, but no later than July 25, 1959, a close enough relationship between Lassiter and Johnstone developed to result in their discussing the buying of a boat, calling every day or two, and, 20 days after the collision, the formation of a small corporation of which Johnstone and Lassiter were two of the three incorporators and initial directors.[107] On September 5, 1959, Johnstone drove a Singer Sewing Machine Company truck into the rear end of the DePlois vehicle, (driven by DePlois and containing Kimmel as a passenger), under circumstances that both investigating officers and a nearby resident found peculiar.[108] As in the collision of August 18, 1958, the target car had not gone to the intersection where a normal car would stop, and Johnstone missed the DePlois vehicle at first, backed up,

and then hit it from the rear.[109] This collision was the basis for substantive Count III. John Barnard, George's brother, (and the passenger in the collision of August 18, 1958), was at the scene, as he had been at others.[110]

Singer Sewing Machine Company was insured by Royal Indemnity Company and that company received claims from both DePlois and Kimmel as a result of the September 5 collision, through attorney Herbert Black.[111] Black had come to work for Weinstein in 1957, after working as a claims examiner for Allstate Insurance Company, and shared offices with Weinstein, at least until mid-July 1959, where George Barnard, who visited the office once a week during the period December 1958 through July 1959, would sometimes see Black, although he would usually ask for Weinstein.[112] It was also Black who initiated the transference of funds to George Barnard at the Giegerich residence at Santa Fe Springs on June 3, 1960.[113]

Both the DePlois and Kimmel claims were settled, in the amount of $6100 for DePlois and $5500 for Kimmel.[114] Of the $5500, Kimmel got $2000, gave $1000 of it to George Barnard, and then went to a bank in St. John with George Barnard and DePlois where both she and DePlois deposited $800.[115]

Allison, the driver of the target car in the collision of August 18, 1958, had known Larry Haynes for some time

prior to January, 1960, when Allison opened the service station at which Haynes was employed.[116] After the station opened George Barnard was there "at least once a night", and it was there that Allison introduced Haynes to George about two to three weeks before the collision of February 16, 1960, (the basis for substantive Counts I and II).[117]

About February 12, 1960, George Barnard met with Allison and Haynes at Allison's service station and George promised Haynes $50 as a down payment on the collision, with more to come afterwards, and later left $50 with Allison to give to Haynes.[118] On February 16, 1960, about two hours before the collision occurred, Haynes discussed the collision with George at Allison's service station, and from there proceeded with George to a meeting with the other participants immediately prior to the collision.[119] At this latter meeting George Barnard talked with Arthur Smith, Richard Sanseri and Don McCoy, discussed the collision with them, and gave them instructions as to how they were to proceed.[120] At that time, under George Barnard's instructions Smith, McCoy and George broke down the front seat of Sanseri's demonstrator, which Smith was driving.[121] After breaking down the seat, another rear end collision was staged with Haynes, (having had the target pointed out by George Barnard, and under instructions from him to "hit him hard and make it pay"), driving into the rear of the car driven by Smith and

containing Sanseri and D. McCoy as passengers.[122]

Smith first met George Barnard at Gardner Ford, where Smith was Assistant Used Car Manager, in November or December of 1958 and shortly thereafter had discussed the staging of a collision with George Barnard and Eugene Miller,[c] which plan was subsequently abandoned.[124] George Barnard was a frequent purchaser of automobiles from Gardner Ford, (as in earlier years he had been with Fields Chevrolet from whom he had bought both the Deegan and Howerton vehicles).[125]

Smith and George Barnard had almost daily discussions about the proposed collision, and Smith, who had known D. McCoy since July 1959, introduced him to Sanseri, a co-worker at Gardner Ford, and solicited their participation by telling them that there had been staged or planned wrecks in the Portland area and that there was no danger of any trouble after.[126]

George Barnard was at the scene of the collision criticizing Haynes and directing Smith, who was not in fact hurt in the collision, as to his post-accident performance.[127] Two days before he had told Haynes to get as much insurance on his car as he could for $25, and gave Haynes the money with which to purchase it.[128] At the meeting just before the

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[c] A former acquaintance of Giegerich, the driver of the weapons car which hit that of Allison, and an old acquaintance of John Barnard, the passenger in Allison's car.[123]

collision George Barnard told Smith, Sanseri and D. McCoy to go to Physicians & Surgeons Hospital, ask for Dr. Puziss and that an attorney would be at the hospital shortly after they arrived; and, although he requested to be taken to Portland Sanitarium, Sanseri was taken to Physicians and Surgeons Hospital anyway.[129] Alan Ruben, an attorney associated with Black, (the attorney who represented DePlois and Kimmel), apparently arrived at the hospital within an hour or two after Smith, Sanseri and D. McCoy arrived, and could have been awaiting them.[130] Smith had told Sanseri earlier that everything was set up, including the doctor and the lawyer.[131] Sanseri felt the doctor was fixed, but the only indication he had that the lawyer knew the collision was staged was the fact that he arrived at the hospital so soon following the accident.[132]

Sanseri, Smith and D. McCoy, through Ruben, each asserted a claim against the carrier covering the Haynes vehicle, and all three claims were settled; Smith receiving $2500, Sanseri $2250, and D. McCoy $1350.[133]

Of the $2500 settlement Smith received a net, after attorney's fees and expenses, of approximately $1100, and, in satisfaction of an earlier arrangement with George Barnard whereby the latter was to receive 1/3 of his net recovery, Smith issued a check to George on March 14, 1960, in the amount of $482.[134] Even though George Barnard was aware

that the instrument was drawn against insufficient funds, he nevertheless negotiated it by placing a deposit of $100 against a washer and dryer and receiving $382 in cash.[135] Later, George Barnard demanded another $25 of Smith and sent his brother John, (the passenger in the Giegerich-Allison accident), around to collect it.[136]

Sanseri received a net of approximately $1200 from the $2250 settlement,and George Barnard called to get his percentage before Sanseri had deposited the settlement check and before Sanseri had told anyone he had received it.[137] After the call Sanseri wrote a check to George Barnard, which the latter cashed, in the amount of $600.[138] D. McCoy netted $700 from his $1350 settlement, but shared the proceeds with no one; although George Barnard tried to collect some money from D. McCoy at least through July 1960.[139] [d]

In August or September 1960, right after investigators interviewed the Deegans, (the investigation which led ultimately to the indictment began April 5, 1960), George Barnard came to the Deegan home and told Mrs. Deegan not to worry, to keep her mouth shut, and to continue telling the stories she had been telling.[140] Deegan went to Weinstein, told him that the investigators had talked about staged accidents and that he was worried that Mrs. Deegan would talk.[141]

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[d] The testimony concerning the efforts to collect from D. McCoy was admitted only as against George Barnard, under an instruction from the Court, and then only as probative of scienter. (RIII 3430/16-24)

Weinstein assured him that there was no reason to worry, that "they were just fishing", but suggested he get Mrs. Deegan out of town, and gave Deegan the money to do so.[142] During this same period Knippel was trying to arrange still another staged accident, as he and Lassiter had attempted to do earlier in March 1960.[143]

On October 10, 1960, the investigators met Boisjolie at work at about 6 PM and took him from there to their office to interrogate him, but before leaving with them Boisjolie asked his wife to call Weinstein "and see what he could do for him."[144] Mrs. Boisjolie called Weinstein, who told her to have Boisjolie call him when the latter got home, and then herself went home, where Knippel and Lassiter appeared at about 11:30 PM (they had been frequently together during this period and in the preceding weeks constantly warning Boisjolie against talking), and told her to tell her husband to keep his mouth shut, that it would be best to leave town.[145] On being advised that the investigating officers were bringing Boisjolie home Knippel and Lassiter left, but returned at 5:30 AM the following morning to advise Boisjolie that they were leaving town and that Boisjolie should get some money from Weinstein and do the same.[146]

On October 19, 1960, Perrin, (the insurance adjuster who had handled the Deegan and Saunders claims for the insurance company and who had had many dealings with Weinstein),

met Weinstein on the street and Weinstein said: "I am not an attorney, I am just a banker, you never saw a banker go to jail, did you? They will never get me. They will get some of the small fry in this matter, but they will never get me."[147] During this same month, (October 23 or 25), Lassiter was explaining to Boisjolie that anyone who "squealed or goofed" would be fixed.[148]

The grand jury proceedings were held in November 1960. Deegan, who called Weinstein before appearing and who admitted that he lied before the grand jury, was met by George Barnard and John Barnard after his appearance and upon telling them what he had said was told "that is a good job."[149] Boisjolie, too, was met directly after he testified before the grand jury, by Lassiter, from whom he learned that Knippel had recently approached a minor about becoming involved in an accident.[150]

On December 30, 1960, Weinstein paid Saunders' hospital bill although he did not discuss the settlement with Saunders, who approved the same, until after the filing of the indictment on January 20, 1961.[151] And on January 21, 1961, prior to being arrested pursuant to the secret indictment returned the day before, Johnstone advised Boisjolie to get out of town and told Boisjolie to go to Weinstein for the necessary funds.[152]

QUESTIONS PRESENTED

1. Was the evidence adduced at trial sufficient to support the convictions for (a), mail fraud; and (b), conspiracy?

2. Was it error as a matter of law, or an abuse of discretion, to deny a separate trial to one charged as a participant in a unitary scheme to defraud and for substantive offenses constituting a part thereof?

3. Was it error to curtail cross-examination directed toward the merits of a pending indictment upon which the indictee-witness had not been brought to trial at the time of cross-examination?

4. Was it error to excise portions of statements, and refuse others, made by the witness when the subject matter thereof did not relate to the subject matter of the testimony given by the witness?

5. Does the date of the last overt act alleged in the indictment, when proven, determine the duration of a conspiracy when other evidence demonstrates that the object of the conspiracy was not accomplished until later? And, if so, were hearsay statements of a conspirator made after such date improperly admitted?

6. Did the trial court err in its instruction upon the subject of conspiracy?

7. Was it a deprivation of the constitutional guarantee of the right of counsel for the trial court to limit argument to a total of three and one-half hours for appellants, out of the six hours allotted to ten defendants at the conclusion of trial?

8. Does the federal court have jurisdiction of a scheme to defraud which utilizes the mails in the furtherance thereof when the scheme itself could otherwise be prosecuted only in the state court?

9. Is the incarceration of a defendant during the course of his trial, of itself, a deprivation of the constitutional guarantee of the right to counsel?

10. Does the substitution of counsel at the start of trial deprive a defendant who has been represented by counsel for seven months prior thereto, and who consents to the substitution, of the effective assistance of counsel?

11. Will this court review a trial court's order denying a motion for new trial when the order is grounded upon findings of fact which in turn are supported by the evidence adduced at the hearing upon such motion?

SUMMARY OF ARGUMENT

On the basis of the evidence adduced at trial reasonable minds could find that every hypothesis but that of guilt was excluded, both as to the substantive charges of mail fraud and as to the conspiracy charge. However, since the sentences imposed were concurrent, and the sentence imposed with respect to the conspiracy charge was no greater than that assessed on the substantive mail fraud charges, it is unnecessary for this court to review the convictions on the conspiracy charge.

There was no error in refusing a separate trial to appellant Weinstein for he was charged as a conspirator in a unitary scheme to defraud insurance companies, and also charged with substantive offenses, under 18 U.S.C. 1341, which were portions of the overall scheme as to which he was charged. In view of the allegations in the indictment, and the proof at trial, there was no prejudicial misjoinder, nor was an abuse of discretion shown.

There was no error in curtailing cross-examination of the witness Deegan for the reason that extensive cross-examination directed to the possibility of bias and interest on the part of Deegan was permitted. The cross-examination of Deegan was curtailed only when counsel attempted to examine into the merits of another and different charge as to which

the witness then stood indicted. When it came to Mrs. Deegan counsel attempted, by cross-examination of her, to inquire into Deegan's interest on bias and into the merits of the indictment upon which he then stood charged. Cross-examination of her, on these subjects, was properly curtailed.

The statements taken from the witnesses Hart and Mrs. Deegan contained matters other than that the subject of their direct examination and, accordingly, the trial court correctly refused to allow their production, either in toto or in part, upon demand under 18 U.S.C. 3500.

A conspiracy does not end until its object has been accomplished, and statements made by a conspirator in furtherance of the conspiracy, to the extent that they be hearsay, are admissible against a co-conspirator not present even though they occur after the last overt act alleged in the indictment, provided the object of the conspiracy has not been fully attained at the time of the statement. But the statements here complained of were not hearsay, or, if so, subject to limiting and protective instructions. In any event, if error there was, it was harmless error.

The trial court's instructions on the subject of conspiracy, viewed in their entirety, as they must be, were a correct statement of the applicable law.

Argument totalling three and one-half hours for appellants, with no less than 30 minutes allotted to any one of them, was a matter within the discretion of the trial judge, charged with the duty of expediting trial, and under the facts of this cause such restriction was neither an abuse of that discretion nor a deprivation of appellants' constitutional guarantee of the right to counsel.

Since the very nature of the fraudulent scheme concocted in the instant cause was such that the use of the mails could reasonably have been foretold, as in the normal course of business incident to effectuating the end result, the matter was properly one for federal prosecution, even though the scheme itself, independent of its utilization of the post office, would not have been a federal offense.

The incarceration of a defendant, who has ready access to his attorney at all times, during the course of trial is not a deprivation of his right to counsel. Accordingly the refusal of the trial court to grant the defendant's motion to continue the principal cause, (involving other co-defendants, and their counsel, as well as many other co-conspirators), until he could be tried on another and subsequent charge for which he was incarcerated, was not an abuse of discretion.

A defendant is not deprived of the effective assistance of counsel where, at the start of trial, there is a substitution of counsel for one who has been representing him for seven months on the same charge. This is particularly true when the defendant consents to the substitution and substituted counsel have the assistance of former counsel, some independent familiarity with the cause, and a recess is given within which to become familiar with the materials gathered in preparation for trial by former counsel.

Where the denial of a motion for new trial made upon the ground of newly discovered evidence is predicated upon findings of fact well substantiated by the evidence adduced at the hearing upon said motion an appellate court will not review the matter.

ARGUMENT

I. THE EVIDENCE OVERWHELMINGLY SUPPORTS THE JURY'S VERDICTS OF GUILTY AS TO APPELLANTS WEINSTEIN, JOHN BARNARD, KNIPPEL AND LASSITER e/

The sentences imposed with respect to the conspiracy charge, as to appellants John Barnard, Knippel and Lassiter, are to run concurrently with the sentences imposed with respect to the substantive mail fraud charges assessed to each; and the sentences are no greater with respect to the conspiracy charge than with respect to those assessed on the substantive mail fraud counts. Accordingly it is unnecessary for this court to review the conviction upon the conspiracy charge, and the contention made by said appellants with respect thereto, if it finds that the respective convictions can be upheld on any of the substantive counts. Lawn v. United States, (1957) 355 U.S. 339, 362; Pinkerton v. United States, (1946) 328 U.S. 640, 642, fn. 1; Hirabayashi v. United States, (1943) 320 U.S. 81, 105; Sherwin v. United States, (C.C.A. 9,

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e/ NOTE: Since four of appellants contest the sufficiency of the evidence to support the verdicts on the substantive counts, as well as the conspiracy count, appellee has combined its arguments as to the sufficiency of the evidence in this section. Appellee, therefore now answers Weinstein's Specifications of Error I and V, John Barnard's Specifications of Error I and III, Knippel's Specification of Error I, and Lassiter's Specification of Error I. George Barnard does not contest the sufficiency of the evidence to support his conviction.

1963) 320 F.2d 137, 156, cert.den. 375 U.S. 964; United States v. Bentvena, (C.C.A.2, 1963) 319 F.2d 916, 953-4 cert. den. sub nom. Mirra, et al v. United States, 375 U.S. 940; Twitchell v. United States, (C.C.A. 9, 1963) 313 F.2d 425, 430.

Insofar as Weinstein is concerned the rule is identical. On the substantive counts VI, VII and VIII he received a sentence of four years upon each, that upon VI and VII to run consecutively, that upon VIII to run concurrently with VI. The sentence upon count IX (the conspiracy count) was for four years and to be served concurrently with the sentence imposed as to count VII.

We submit that the record is replete with evidence to support, and devoid of error with respect to, the convictions of said appellants on the substantive charges of mail fraud. However, since appellants have devoted considerable attention in their respective briefs, by incorporation of another brief or otherwise, to numerous assignments of error, we have attempted to meet the contentions advanced by each.

Preliminarily it should be noted that, as Weinstein says (Br. p.14), there can be no doubt that the mails were used, although his conclusion that they were only "very incidentally" employed does not agree with the facts. For the record is replete with mailings in furtherance of the scheme. 153/

The very nature of the fraudulent scheme was such that the participants must reasonably have foreseen that the mails would be used, in the ordinary course of business, before the objects of the scheme could be attained. Of necessity, the mailings were an integral part of the plan. And, all the other elements of mail fraud present, this is enough to sustain a conviction. Pereira v. United States, (1954) 347 U.S. 1, 8-9; Fisher v. United States, (C.C.A. 8, 1963) 324 F.2d 775, 780. We proceed, therefore, to a discussion of the evidence which overwhelmingly demonstrates the fraud, the knowing participation of appellants therein, and their combination to effect the perpetration thereof.

While Weinstein expresses some reservations on the subject, (Br. p. 15), only John Barnard seriously contests the sufficiency of the evidence to establish the collision of August 18, 1958 as staged. Although no participant testified that this collision was staged f/ the absurdity of the contention that it was not appears from a cursory examination of the facts. g/

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f/ Allison confessed, but the confession was offered, and admitted with cautionary instructions, only as against Allison. 153A/

g/ In order to avoid the proliferation of Record references, facts hereinafter restated in support of argument will, for the most part, be referenced at the conclusion of each paragraphed collection thereof. Under the appropriate reference number in the Appendix will appear the collection of references which support the facts restated.

Giegerich, brought to Oregon by George Barnard for the very purpose, rear-ended a vehicle driven by Allison and containing John Barnard, supposedly with such force as to break the steering wheel against Allison's chest yet moving the vehicle only 13 feet and leaving Allison with a perfectly normal chest. Allison, with no other vehicle in front of him, stopped sufficiently far away from the intersection to avoid being forced therein and left prey to cross-traffic. The investigating officer found Allison devoid of any explanation for such abnormal stopping procedure and all participants on friendly terms. Furthermore, the address on the Giegerich driver's license was 334 S.E. Grand, (Ex. 80B), yet Allison reported him as residing at 12536 S.E. Lincoln Ct.,(Ex.99A), an address ostensibly known only to Giegerich and George Barnard at the time of the collision. It is unreasonable to conclude that Allison would have obtained any address other than that appearing on Giegerich's driver's license if the collision had been, in fact, an accident.[154]

The investigating officer found a friendly attitude because the participants were friends engaged in a joint enterprise. And this conclusion is buttressed by two other facts: (a) Weinstein had no difficulties in reaching Giegerich, an old friend of George Barnard, in California directly by mail, although every address given by Giegerich in the Portland area was fictitious; and (b) Weinstein began

issuing checks to John Barnard, pending settlement of the latter's claim for damages, more than a month before the collision, (a month and a half before assuming representation), and was repaid out of the proceeds of settlement. (RIII 5330/11-22). 155/

That the remaining collisions were staged is conceded by Weinstein, (Br. p. 15), and not contested by appellants Knippel and Lassiter.

The fraudulent nature of the scheme, and the mailings in furtherance thereof, being established it remains only to determine whether or not there was sufficient evidence to connect appellants therewith, and demonstrate both their knowledge of the fraud and their concert of action with respect thereto. That there was an abundance of such evidence is clear from what follows:

A. THE EVIDENCE OF WEINSTEIN'S GUILT

Weinstein told Perrin that he was just a banker, not an attorney, and through the period for which he was charged he certainly acted in that capacity. For he advanced money not only to his own clients, but as well to one not yet his client, (John Barnard), and to those who were supposedly the clients of another attorney, (Kerr, McCoy and Rose). He gave Saunders $200 to $300 the day after his collision and wired funds to Wooldrige, in Cheyenne, even though the latter's case did not look good. 156/

While George Barnard generally dressed rather shabbily and never seemed to have much money he visited Weinstein's office several times a week and on August 16, 1958 received $100 from him. Five days later George purchased a car for $100 which was used in a staged collision that provided clients for Weinstein. In September he received $575 from Weinstein and in October again obtained in excess of $100. Interestingly enough it was during this period that George Barnard paid Scott $500 to rear-end the Rose vehicle while telling Rose and McCoy to get Weinstein to handle their claims.[157]

When the time came that Deegan was concerned lest his wife reveal to the investigators that the collisions had been staged it was Weinstein who gave the Deegans money to get out of town.[158] This alone was sufficient to support a finding that Weinstein knowingly participated in the fraudulent scheme. See Kaplan v. United States, (C.C.A. 9, 1964) ____ F. 2d _____, (No. 18741 decided Mar. 13, 1964).

Weinstein referred Saunders to Dr. Davis of the Orthopedic and Fracture Clinic, but it was Weinstein to whom the clinic looked for payment of the Saunders' bill, and who in fact paid it on December 30, 1960. This was the same Dr. Davis to whom both McCoy and Deegan were referred by George Barnard, McCoy receiving the card of the Orthopedic & Fracture Clinic from George Barnard at the same time he was handed one of Weinstein's cards.[159]

Appellants would characterize these advances as "loans", and some of the Government witnesses used that expression, but it matters not what they be called. For the scheme was to defraud insurance companies on the matter of personal injury claims and a loss of employment helped make the injury look good. Weinstein went so far as to instruct the Deegans not to work.[160] However, a loss of employment needs underwriting. Financing at least until the ill-gotten gains could be divided. And "loans" in advance of an "accident" yet to happen acquire a peculiar significance.[161]

Perhaps of even greater significance is the fact that Weinstein continued to make these "loans" to another attorney's clients after he was alerted to talk that the collision had been staged.[162]

But Weinstein was more than a banker. He instructed the Deegans on how to feign the injuries which they did not have. He convinced Saunders to act like an injured man, when he was not. He directed the damaging of the Deegan car, and then its disposal when he realized that photographs would reveal the fraud. It stretches credulity beyond the limits of elasticity to say that these were the facts, or counseling, of an attorney who was "fooled."[163]

And there was Giegerich, who had given many different addresses, none of them correct, during his stay in Portland; although George Barnard, an old friend, knew his address for

he was accustomed to visit Giegerich at Santa Fe Springs, California. It is hardly surprising, then, to note that during the period when George Barnard was visiting Weinstein's office several times a week that Weinstein sent a registered letter to Giegerich at his home address.[164]

Appellant argues that Weinstein must be believed when he states that he received the Giegerich address from Minor, claims manager for Fireman's Fund. There are two answers to that: First, it is an erroneous legal premise, Elwert v. United States, (C.C.A. 9, 1956), 231 F.2d 928, 933-4; Second, Weinstein had already been demonstrated a liar, in at least two particulars. (a. In concluding the Saunders' settlement Weinstein had simulated the Saunders' signature, as near as he could to the way Saunders would have signed it, and then signed his own name as witness to the Saunders' signature. Under any view of the evidence the latter was a falsehood for Weinstein knew that Saunders was not present; and it throws considerable doubt on the validity of the alleged power of attorney which Weinstein produced at trial. b. Weinstein signed, and filed, complaints for both Deegans, in which he alleged that they were caused to sustain back and neck injuries as "a direct and proximate result of the negligent acts and omissions of the defendant." Yet they were not injured and he found it necessary to instruct them as to how to act so as to indicate that they were.)[165]

Weinstein received the Deegan settlement check but it was not he that notified his clients that the funds in settlement of their claim had arrived. It was George Barnard who came to the Deegan's home to advise them that the check was at Weinstein's office.[166] The reason for this is obvious. Barnard had a financial interest in the result, just as did Weinstein, and the latter knew it. How else explain the employment of Barnard as a messenger boy - rather than a letter or the telephone?

Weinstein demonstrated his knowledge of the fraudulent nature of things, too, in his efforts to cover up the manner in which he had obtained the participants as clients. He asked the Deegans to say that Irene Blair had referred them to him, when in fact it was George Barnard. He asked Rose and Gordon McCoy to say that Bob Svilar had referred them to him, when in fact it was George Barnard, even to the extent of giving them Weinstein's card.[167]

Weinstein deepened his cover, when talk reached him that the collisions were said to be staged, by referring the participants to his associate, (with whom he split the fee). But when he learned that the insurance company was about to deny coverage on the collision of January 17, 1959, (by opening the letter of April 5, 1959, addressed to Wooldrige, care of Weinstein), he again actively participated, rather than risk the failure of collection from that collision.

(At the time of trial Weinstein produced the letter, and opened envelope). Wooldrige had earlier endorsed a check which Weinstein had given him with the address 8828 N.Dwight. To this address came Knippel, ostensibly Gray's client, seeking Wooldrige, only to be referred to Mrs. Havel, the mother of Wooldrige's girl friend, from whom he obtained a Council Bluff,Iowa, address. Mrs. Havel thereafter received a telephone call from a man announcing himself as attorney Weinstein, of Weinstein and Gray, to whom she said that Wooldrige resided in Council Bluffs, Iowa. In December 1959 it was not Gray, ostensibly Knippel's attorney, but Weinstein, who wrote the insurance company that the Wooldrige address was 1809 S.Sixth St., Council Bluffs, Iowa. Then, for the first time, the insurance company was able to locate Wooldrige, the driver of the vehicle upon which they had the coverage.[168]

It is true that no witness testified that Weinstein said to them: "I knew these collisions were staged right from the start and I helped direct and promote the whole scheme." It was hardly likely that he, an attorney, would make such a statement, even to George Barnard. Weinstein says: "There is no testimony that anyone told Weinstein about any collision being staged." (Br. p. 158) But someone did. For Weinstein told Rose that "there is some talk of this accident being a phony or a fixed accident." Any normal attorney,

upon being advised that he might be representing participants in a staged collision, would have cross-examined his clients, not tell them how to answer such allegations and transfer them to an associate with whom he would split the fee.[169]

Weinstein says "The issue is knowledge." (Br.p.15). On that issue, in an analogous situation, Judge Friendly, speaking for the court in United States v. Benjamin,(C.C.A.2, 1964) _____ F.2d _____. (No. 28404, decided February 17, 1964) had the following comments:

> But, as Judge Hough said for this court years ago: "when that state of mind is a knowledge of false statements, while there is no allowable inference of knowledge from the mere fact of falsity, there are many cases where from the actor's special situation and continuity of conduct an inference that he did know the untruth of what he said or wrote may legitimately be drawn." Beutel v. United States, 13 F.2d 327, 329 (2 Cir), cert. denied sub nom; Amos v. United States, 273 U.S. 713 (1926). (Id. p. 1081.)
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> As Judge Learned Hand said in a similar context: " . . . the cumulation of instances, each explicable only by extreme credulity or professional inexpertness, may have a probative force immensely greater than any one of them alone." United States v. White, 124 F.2d 181, 185 (2 Cir. 1941). (Id. p. 1083.)
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> " . . . the government can meet its burden by proving that a defendant deliberately closed his eyes to facts he had a duty to see . . ." (Id. p. 1083.)

With the foregoing in mind, it is evident that no reasonable jury could come to any other conclusion than that Weinstein was guilty as charged in light of the record before it. The possibility that unless he were a party

to the venture George Barnard, et al, would have associated with him to the extent shown by the record below "is too remote for serious discussion." See Delli Paoli v. United States, (1957) 352 U.S. 232, 236; where court adopts the language of Judge Learned Hand appearing in 229 F.2d at 320. Cf. United States v. Green, (C.C.A.7, 1964) 327 F.2d 715,717, rhrg. den., pet.for cert. filed 4/7/64, sub nom. Gayles v. United States.

B. THE EVIDENCE OF JOHN BARNARD'S GUILT

John Barnard's participation in the scheme was sporadic, perhaps explained by the fact that at one stage he and his brother George were on the outs (RIII 1463/1-5); but, like a buzzard, he hovered over the scene from beginning to end.

He was a passenger in a vehicle, driven by his close friend Allison, involved in the collision of August 18, 1958, which obviously was staged, (supra pp. 36-38). Approximately a month before the collision he went to Weinstein and obtained the first of a long series of advances, four of them before the collision, all of which were repaid from the proceeds of settlement on his claim for injury. Although Weinstein had earlier represented him, such representation had been concluded May 1, 1958, two months before the first of the series of checks and three months before the collision. 170/

He participated with his brother George in a conversation at which Scott was told how to testify during the trial of the Rose case, and he was at the scene, observing, when Johnstone ran into DePlois. Standing alone this latter fact could be of little significance. However the only collision scenes where George Barnard's supervision was not noted were the ones in which John Barnard was himself either a passenger, or, as in the Johnstone-DePlois fiasco, an observer. Coupled with the other evidence of John Barnard's contribution to the objects of the scheme this appearance cannot be deemed coincidence. For the record is clear that the latter collision was staged.[171] Cf. United States v. Monica, (C.C.A. 2, 1961) 295 F.2d 400, 401-2, cert. den. 368 U.S. 953; United States v. Migliorino, (C.C.A. 3, 1956) 238 F.2d 7, 10.

It was John Barnard who collected from Smith a portion of the proceeds of settlement demanded by George Barnard, and it was also he who, again with his brother George, came to check on Deegan's performance before the investigating grand jury.[172]

C. THE EVIDENCE OF LASSITER'S GUILT

Lassiter appears to have joined the conspiracy on September 5, 1959 when, in company with his friend Knippel, he joined in the planning of the collision for that date. Nothing could be clearer, from the direct evidence in the record, than Lassiter's direct involvement in the staging of the September 5 collision. A friend of both Knippel and Johnstone, he met with George Barnard, Knippel, Kimmel and DePlois to plan the collision in which Johnstone would rear-end DePlois. He was thereafter, along with Knippel, directed by George Barnard to break the front seat of the DePlois vehicle. He was then observed, with Knippel, to take the vehicle away and shortly thereafter return the same with the front seat broken back. There can be no reasonable conclusion but that he had done what he had been told to do.[173]

Lassiter asks how can he, by reason of this act, be guilty of mail fraud? The answer is simple. He helped with others to plan a collision whose participants were to misrepresent the facts in order to obtain money from an insurance company. Knowing the fraudulent nature of the affair, he actively participated in setting the stage for the events which he could reasonably anticipate would cause the mails to be used in the normal course of business in settling the

claims which were to be asserted following the collision. That was sufficient to establish his guilt. Babson v.United States, (C.C.A. 9, 1964) _____ F.2d _____, (No. 18410, decided April 8, 1964); United States v. Bentvena, supra, p. 927-8; Blue v. United States, (C.C.A. 6, 1943) 138 F.2d 351, 358, cert. den. 322 U.S. 736; Silkworth v. United States, (C.C.A. 2, 1926) 10 F.2d 711,717, cert. den. 271 U.S. 664.

Lassiter's activities, however, did not stop with the preparation and planning for the September 5 collision, for in March 1960, he and Knippel were again attempting to set up another staged collision. And, in October 1960, when Mrs. Boisjolie called Weinstein to tell him that Boisjolie had been picked up by the investigating officers it was Lassiter, accompanied by Knippel, who came to Boisjolie's home, first at 11:30 PM, and then at 5:30 AM, for the purpose of advising Boisjolie to leave town and to get in touch with Weinstein for the money to do so. Lassiter also kept a check on Boisjolie during November 1960 to assure that only the information desired reached the then investigating grand jury.[174]

D. THE EVIDENCE OF KNIPPEL'S GUILT

Knippel first joined the conspiracy in October, 1958 when he and George Barnard outlined for Scott the plan for the October 16 collision. Knippel told Scott at that time

that he would insure that the other participants turned over to George Barnard part of the money they expected to collect. A year later, while the jury was deliberating on the Rose action, Knippel and George Barnard, accompanied by Boisjolie, again met with Scott and Scott was told to go with Knippel to collect Barnard's share of the money from Rose.[175]

In December 1958, Knippel and George Barnard, this time in Deegan'spresence, were discussing the planning of yet another staged collision, and shortly thereafter, Knippel rode as a passenger in just such another one. In this instance Knippel assisted George Barnard in giving final instructions to Wooldrige, the driver of the car which was to hit that in which he rode. Like Kerr, Rose and McCoy, he went first to Weinstein and by him was referred to Gray although, it was Weinstein who thereafter advanced monies to Knippel.[176]

When Wooldrige disappeared it was Knippel who came tracking him down at the address which appeared on an endorsement of Weinstein's check to Wooldrige. Note that when the address of Wooldrige was communicated to the insurance company it was not through Knippel's attorney Gray, but through Weinstein.[177]

Knippel came with George Barnard to DePlois' home to discuss the forthcoming collision of September 5, 1959. Still later that evening Knippel participated in a planning conference for the collision, with George Barnard, Lassiter,

DePlois and Kimmel, before taking the DePlois vehicle away, with Lassiter, to return it with a broken front seat - after being told to do so by George Barnard.[178] This was enough to establish his guilt. See United States v. Bentvena, supra, pp. 927-8. United States v. Guiliano, (C.C.A. 3, 1959) 263 F. 2d 582, 585; United States v. Migliorino, supra, p. 9.

Knippel did not stop his activities with the September 5 affair but attempted both in March 1960, (with Lassiter), and in September 1960 to arrange another staged collision. And when Mrs. Boisjolie called Weinstein to tell him that Boisjolie had been picked up for interrogation, it was Knippel and Lassiter who came to warn Boisjolie to leave town and look to Weinstein for the money to do so.[179]

E. THE MOTIONS FOR JUDGMENT OF ACQUITTAL WERE PROPERLY DENIED

Appellants contend that the trial court erred in denying their respective motions for judgment of acquittal, and John Barnard, Knippel and Lassiter assert that the error occurred in the denial at the close of the government's case. However, since all three thereafter proceeded to adduce evidence in their own behalf,[180] this court will look to the entire record to determine whether or not there was a sufficiency of evidence to support the judgment of conviction.

United States v. Calderon, (1954) 348 U.S. 160, 164; Benchwick v. United States, (C.C.A. 9, 1961) 297 F.2d 330, 335.

What, then, examining the entire record, is the test to be applied? Citing, and quoting freely from, a plethora of cases alleged to support his view Weinstein argues that the rule for which he contends is stated in United States v. Saunders, (C.C.A. 6, 1964) 325 F.2d 840, (Br. p. 72), and that "some doubt has arisen in this court as to the true test to be applied in determining the sufficiency of the evidence." (Br. p. 64). Nothing could be further from the fact. There is neither doubt in this court, nor validity to the Saunders rule. On that very issue, and while dealing with a similar argument based on Saunders, this court has only recently said: "The view urged upon us is not the law. The current correct test is whether ' reasonable minds could find that the evidence excludes every hypothesis but that of guilt.'" Kaplan v. United States, supra. See also Woxberg v. United States, (C.C.A. 9, 1964) _____ F.2d _____(No. 18805, decided March 12, 1964); and Byrnes v. United States,(C.C.A.9, 1964) 327 F. 2d 825, 829, fn. 5a. And the test is the same whether the evidence be direct or circumstantial. Kaplan v. United States, supra; Foster v. United States, (C.C.A. 9, 1963) 318 F. 2d 684, 690.

It may be that the "two different rules" of which Weinstein speaks (Br. p. 65) are in fact but two different expressions of the same rule, for in a recent case the Sixth Circuit defined "substantial evidence" as that "which a reasonable mind might accept as adequate to support a conclusion." United States v. Barnes,(C.C.A. 6, 1963) 313 F.2d 325, 326. In any event the rule in this circuit is crystal clear. Kaplan v. United States, supra.

Certainly upon the evidence adduced in the instant proceeding reasonable minds could find that it did exclude every hypothesis but that of guilt. The trial court and jury would have indeed been naive to arrive at any other conclusion. Accordingly the motions for judgment of acquittal were properly denied.

F. THE EVIDENCE ESTABLISHED A SINGLE CONSPIRACY

Appellants contend, relying upon Kotteakos v. United States, (1946) 328 U.S. 750, and Rocha v. United States,(C.C.A. 9, 1961) 288 F. 2d 545, cert. den. 366 U.S. 948, that the Government failed to prove an overall conspiracy; that at best it proved only a series of unrelated conspiracies. (John Barnard Br. pp. 14-15; Lassiter Br. pp. 9-11; Knippel Br. pp. 9-10; Weinstein Br. pp. 114-119). In light of the facts here present the reliance is misplaced.

In both Kotteakos and Rocha there were a number of isolated transactions, each with different participants having nothing to do with the others, as to which there was but one "common key figure." The instant case is quite different in that there was one overall scheme, albeit envisioning a series of substantive offenses. But the latter fact does not make the conspiracy charged fail for duplicity. Frohwerk v. United States, (1919) 249 U.S. 204, 209-10; United States v. Crosby, (C.C.A. 2, 1961) 294 F.2d 928, 945, cert. den. sub nom. Mittleman v. United States, 368 U.S. 984, rhrg. den. 369 U.S. 881. For, as Justice Holmes, in writing for the court in United States v. Kissel (1910) 218 U.S. 601, put it:

> ". . . when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one." Id. p. 607

In the instant case the conspiracy was to mulct insurance companies, in gross, through a continuing series of staged collisions. It was, of course, essential to the scheme that the truth of the events be kept concealed. Otherwise, successful accomplishment of the scheme, a flow of money from the insurance companies for distribution amongst the participants, would have been impossible. This

was the "continuous result" contemplated; and the "continuous cooperation" called for was the management, direction, financing and control of the actors. To these ends were devoted the talents of George Barnard, Weinstein and John Barnard, with an assist from Knippel and Lassiter.

George Barnard was unquestionably a "key figure", for he was exposed with each differing facet of the scheme brought to light. But he was not alone, for working with him throughout the period charged were Weinstein and John Barnard. The former as the attorney necessary to process the scheme through the appropriate channels, and as financier for the participants; the latter as combination actor-overseer-collector for brother George. Weinstein combined with George Barnard from the beginning and was still acting on behalf of the enterprise in September 1960 when he paid Deegan to get Mrs. Deegan out of town before she started to talk. See Kaplan v. United States, supra. So, too, with John Barnard who, while intermittent in his appearances, came early and stayed late. While Knippel appears first in October 1958, and Lassiter in January 1959, both thereafter continued in concert with George Barnard through 1960.

In light of the continuance of efforts in behalf of the fraudulent scheme by both Weinstein and John Barnard, Allison, (a convicted co-defendant who does not appeal),

too, appeared in both the first and last acts 7, it is difficult to reach even a bifurcation of the overall plan. But if it be considered that George Barnard worked with one group from mid-1958 through late 1959 (Weinstein, John Barnard), and with another from late 1959 through 1960, (Black, Ruben, Knippel, Lassiter), it still does not establish duplicitous error. For it is unnecessary to show that each co-conspirator knew all the others, or that each witness mention all, or that each one be involved throughout the entire perior charged. United States v. Green, supra; United States v. Micele, (C.C.A. 7, 1964) 327 F. 2d 222, 225; United States v. Stromberg, (C.C.A. 2, 1959) 268 F. 2d 256, 264. However, by any reasonable view of the evidence, the participation of George Barnard, Weinstein and John Barnard from start to finish is abundantly established. When later joined by Knippel and Lassiter the five continued until stopped.

In Blumenthal v. United States, (1947) 332 U.S. 539 the court, although admitting that the evidence disclosed two agreements, found that the two agreements were tied together as stages in a larger and all-inclusive combination directed to achieving a single unlawful end. Id. p. 558. Justice Rutledge (he who delivered the opinion in Kotteakos), disguished Kotteakos from the Blumenthal situation in that the former lacked any showing of mutual aid and interest between those with whom the sole common figure was alleged to have

conspired. In making the distinction he further said, of the Blumenthal facts:

> All by reason of their knowledge of the plan's general scope, if not its exact limits, sought a common end, to aid in disposing of the whiskey. True, each salesman aided in selling only his part. But he knew the lot to be sold was larger and thus that he was aiding in a larger plan. He thus became a party to it and not merely to the integrating agreement with Weise and Goldsmith.
>
> We think therefore that in every practical sense the unique facts of this case reveal a single conspiracy of which the several agreements were essential and integral steps, and accordingly that the judgments should be affirmed. (Id. p. 559)

Amongst appellants there was that concert of interest and cross-play of aid, quite apart from their interest in recovering the results of their own acting, of which Justice Rutledge spoke in Blumenthal. Witness John Barnard, collecting his brother George's share of Smith's recovery, and his aid to George in instructing Scott as to the latter's testimony in the Rose trial. Witness also Knippel, assisting in the staging of the DePlois collision, and in the planning of the Rose collision.

Lastly, we comment briefly on appellants' great stress upon the words "circumstantial evidence". Suffice it to say that "it is recognized that conspiracies are seldom capable of proof by direct testimony and that it is settled that they may be inferred from the acts of the parties thereto." Pennington v. United Mine Workersof America, (C.C.A. 6, 1963) 325 F. 2d 804, 811.

We submit that the record in this case establishes beyond peradventure that the conspiracy was unitary and the proof thereof overwhelming.

II. DENIAL OF SEVERANCE AS TO WEINSTEIN WAS NOT IMPROPER

Appellant Weinstein's Specification of Error No. II is that the trial court erred in denying his Motions for a Separate Trial.[181] He asserts the error in two respects. First, that there was an abuse of discretion in the refusal to permit a severance and, second, that there was a misjoinder requiring severance as a matter of law. We dispose of these contentions in reverse order.

There is no dispute that the motions of appellant for severance were timely. However, the authorities cited do not support Weinstein's contention that the denial of severance here was error as a matter of law.

Appellant relies upon a footnoted comment addressed to a brief filed by the Government in Williamson v. United States, (C.C.A. 9, 1962) 310 F. 2d 192, 197 fn. 16. Certainly Williamson itself is of no aid to Weinstein, for the court there found proper the denial of a motion for severance, but upon facts not present in the instant case. As to the footnote, the court palpably was directing itself to the

situations found in Ward v. United States, (C.A.D.C. 1961) 289 F. 2d 877 and Ingram v. United States, (C.C.A. 4, 1959) 272 F. 2d 567. Situations quite different from that found in the instant proceeding.

The Ward case dealt with a seven-count indictment involving three separate and unrelated narcotics sales. The appellant there was joined, and charged as to the first two, with another defendant who was the only one charged as to the third sale. The latter sale was unrelated to the earlier transactions and the court noted particularly that there was no conspiracy charged. (Id. p. 878) For lack of any connection the court held it a prejudicial misjoinder.

In Ingram, supra, the court said of the two cases consolidated for trial, involving two separate instances of removing, concealing and possessing non-tax-paid liquor, and no charge of conspiracy, that:

> "Aside from the identity of time and the relatively short distance between the two homes, there is nothing in the record indicating a connection between the violation of the Ingrams at 307 Hay Street with that of the Gills at 301" (Id p. 568)

On those facts the court held it a prejudicial misjoinder.

The inapplicability of United States v. Spector, (C.C.A. 7, 1963) 326 F. 2d 345 is immediately apparent when it is recognized that count one, of the nine-count indictment, dealt with a conspiracy which ended in November 1956, while

counts two through nine concerned substantive offenses the first of which occurred December 21, 1956. Only Spector and Scott were named in the conspiracy count while Jacobs and Starr were joined with Spector in the remaining counts. Scott was not charged with having participated in the acts or transaction alleged in counts two through nine, nor were Jacobs and Starr charged with violating the substantive statute underlying the conspiracy count. (Id. pp. 349-350) The Court there said:

> "In conclusion, it is apparent in the instant case that there is no identity of defendants, of the character of the offenses, the allegations of fact, or of the time. Therefore, a severance should have been granted." (Id. p. 351)

In the instant case the situation is much more analogous to that found in Slocum v. United States, (C.C.A.8, 1963) 325 F.2d 465 where essentially, as here, the motion for severance was grounded on the allegation that several disconnected schemes were charged and proved. The court there felt, as we submit this court should now feel, that "the scheme charged was sufficiently unitary to justify the joint trials of the defendants." (Id. p. 467)

Appellant's principal attack on the court's denial of his motion for severance, insofar as he contends it erred as a matter of law for misjoinder, must necessarily be based upon the somewhat slanted view he takes of Rule 8(b) Federal Rules of Criminal Procedure. It is, however, well established

that this rule permits the "joinder of all defendants engaged in a connected course of conduct out of which arose separate crimes alleged against different persons." Kivette v. United States, (C.C.A. 5, 1956) 230 F.2d 749, 753, cert. den. 355 U.S. 935; Wiley v. United States, (C.C.A. 4, 1960) 277 F.2d 820, cert. den. 364 U.S. 817; Kleven v. United States, (C.C.A. 8, 1957) 240 F. 2d 270; Scheve v. United States, (C.A.D.C. 1950) 184 F. 2d 695. And Williamson, supra, does not differ in its view (see cases cited fn. 16, 310 F.2d 197). In the instant case the fraudulent scheme to "take" the insurance companies is the "connected course of conduct" and the various collisions the "separate crimes" arising therefrom.

In Schaffer v. United States, (1960) 362 U.S. 511, the court found no prejudice in the refusal of severance where a conspiracy count was dismissed for failure of proof but separate substantive offenses were submitted to the jury. A fortiori where the conspiracy count is supported by sufficient evidence; for this is the count which, says the Supreme Court, "originally justified joinder". (Id. p. 516)

There being, then, no question of improper joinder the question is purely one of discretion for the trial court. Rule 14, Federal Rules of Criminal Procedure. Opper v. United States, (1954) 348 U.S. 84, 95; Fisher v. United States, supra, p. 881. Certainly the record in this case does not disclose that the trial court abused its discretion in denying

a severance, and appellant cites no authority demonstrating such an abuse. Appellant instead embellishes his argument by aphorisms more appropriate to the classroom than the courtroom.

Considerations of public policy in the administration of justice usually dictate that severance be denied, wanting a clear-cut showing of prejudice against which the trial court can exercise no sufficient protection. And the determination with respect to severance, being one left to the sound discretion of the trial judge, will not be disturbed on appeal absent a showing of a clear abuse of such discretion. Davenport v. United States, (C.C.A. 9, 1958) 260 F. 2d 591, cert. den. 359U.S. 908; (Accord: Shockley v. United States, (C.C.A. 9, 1948) 166 F. 2d 704, cert.den. 334 U.S. 350.) "Such a motion is rarely granted" (Id. p. 594). For

> Where two or more defendants are indicted for a joint transaction, it is inadvisable to split up the case into many parts for separate trials, in the absence of a very strong and cogent reason therefor. This is especially true in conspiracy charges, from the very nature of the case. Dowdy v. United States, (C.C.A. 4, 1931) 46 F.2d 417, 421.

Weinstein, eulogizing the role of lawyer in our society, attempts to find an abuse of discretion in that he as a lawyer was tried with those he "represented." The short

answer to that is found in a record brimming with instances where Weinstein did considerably more than "represent" a group he, quite appropriately, now labels "disreputable people." (Br. p. 77)

Finding no cogent reason, either from the record or appellant's argument, suggesting an abuse of discretion in the denial of the motions to sever we believe appellant's contentions are best answered in the oft-quoted words of Judge Learned Hand:

> A man takes some risk in choosing his associates and, if he is hailed into court with them, must ordinarily rely on the fairness and ability of the jury to separate the sheep from the goats.
>
> United States v. Fradkin, (C.C.A. 2, 1935) 81 F.2d 56, 59, cert. den. 297 U.S. 720.

III. THERE WAS NO ERROR IN CURTAILING THE CROSS-EXAMINATION OF THE WITNESSES DEEGAN

Appellant Weinstein's Specification of Error No. III is that the trial court erred in curtailing the cross-examination of both Deegan and his wife. The area of inquiry which Weinstein was pursuing, when cut-off, involved the indictment of Deegan for an alleged violation of 18 U.S.C. Sec. 1503, and the events which occurred thereafter up to the time of Deegan's testimony.

Weinstein contends that the Sec. 1503 charge brought against Deegan was spurious and that it was of primary importance that he be permitted to show that it was spurious by the cross-examination of both Deegan and his wife. In taking this position he appears to confuse the right to interrogate with respect to what happened in regard to the Sec. 1503 charge with the right to inquire into the merits of a pending proceeding. He further completely overlooks the basis upon which the former line of interrogation is permitted. This becomes particularly obvious when analyzing his complaints anent the Mrs. Deegan cross-examination.

It is fundamental that the extent of cross-examination upon an appropriate subject of inquiry is within the sound discretion of the trial court, and that court may exercise a reasonable judgment in determining when a subject has been exhausted. Alford v. United States, (1931) 282 U.S. 687, 694. Long held appropriate areas of inquiry on cross-examination are those of bias, prejudice, interest, hope for immunity or reduction of sentence, and the coercive effect of detention by officials - in short, those matters affecting the witness' motive in testifying. Alford v. United States, supra; Thurman v. United States, (C.C.A. 9, 1963) 316 F.2d 205; United States v. Masino, (C.C.A. 2, 1960) 275 F.2d 129;

Spaeth v. United States, (C.C.A. 6, 1956) 232 F.2d 776; United States v. Hogan, (C.C.A. 3, 1956) 232 F.2d 905. And Weinstein was allowed full sway so long as he stayed within these appropriate areas of inquiry.

From Deegan Weinstein was permitted to, and did, develop that Deegan was indicted on September 1, 1961, for attempting to intimidate a witness in the instant proceeding; arrested and jailed that night under $50,000 bail which was reduced on September 5 to $20,000; that on September 7 while in Rocky Butte jail he gave a statement to the FBI and on September 8 entered a plea of guilty in the principal case; that on September 11 bail was reduced to $2500 and Deegan later released upon posting the same; that he had not at the time of testifying been sentenced, (on the intimidation charge), nor had he entered a plea; that he was staying at the New Heathman Hotel by arrangement of Government agents; that officers occupied the adjoining room and constantly accompanied him back and forth from the courtroom. This subject was even further developed through the testimony of Carskadon, Deegan's attorney.[182/] It was only when Weinstein attempted to inquire into the merits of the intimidation charge that he was cut short, as he should have been. See Lawn v. United States, supra, pp. 355-7.

On advice of counsel Deegan refused to answer questions dealing with the matters for which he then stood indicted under the intimidation charge, on the ground that his answers might incriminate him. (RIII 535/5 - 537/6). Deegan's claim of privilege was necessarily honored. Alford v. United States, supra, at 694.

Since Weinstein was allowed to, and did, inquire upon those subjects held a permissible line of inquiry in United States v. Hogan, supra, Sandroff v. United States, (C.C.A. 6, 1946) 158 F.2d 623, cert. den. 338 U.S. 947; and Farkas v. United States, (C.C.A. 6, 1924) 2 F. 2d 644, his reliance thereon seems inappropriate. Cf. United States v. Migliorino, supra, pp. 10-11.

So, too, with Masino and Spaeth, both supra. In the former, the court held only that the disposition of a state narcotic charge and the part played by government representatives in quashing the same was a permissible area of inquiry. Masino did not hold that inquiry into the merits of the state court charge was, or would have been, permissible. Nor did the Spaeth case deal with an inquiry into the merits of a pending charge. There the error was in curtailing cross-examination as to the circumstances surrounding an earlier trial, conviction and sentencing for bank robbery and the then incarceration of the witness, on the theory that "his testimony could well have been guided by his hope of an early parole." (232 F. 2d 779)

In the instant case the trial judge exercised that reasonable judgment called for in Alford, supra, in curtailing cross-examination, for the permissible areas of interrogation had been exhausted save for the attempt to infringe upon Deegan's constitutional rights, timely invoked.

The contention that the cross-examination of Mrs. Deegan was unduly restricted is completely without merit. For Weinstein attempted, by cross-examination of Mrs. Deegan, to interrogate on the subject of bias, motive or interest, on the part of her husband, an earlier witness. This was clearly not a permissible cross. It was equally impermissible to attempt, through her, to explore the merits of the intimidation charge.

A cursory examination of the offers of proof made by Weinstein (Br. pp. 93-97; 99; 101-103) indicates much that was developed in the cross-examination, much clearly immaterial, and much opinionative matter. (RIII 502/7-11). Under these circumstances, the trial court could reject the whole, as it did. Lane v. United States, (C.C.A. 9, 1944) 142 F. 2d 249, 253.

In concluding this portion it should be pointed out that the trial court time and time again indicated to Weinstein that he would be permitted to explore appropriate areas of inquiry concerning interest and bias. [183] Weinstein

can hardly be heard to complain now because he did not choose to wring them dry, but instead attempted to try the merits of a then pending collateral proceeding.

IV. THERE WAS NO ERROR IN WITHHOLDING PORTIONS OF THE HART AND GERALDINE DEEGAN STATEMENTS

Appellant Weinstein's Specification No. IV is that the trial court erred in denying him access to certain documents upon motion made pursuant to 18 U.S.C. 3500. The documents of which he complains are Court exhibits C, I and K.

Appellant was entitled to statements given by the witnesses insofar as they related "to the subject matter as to which the witness has testified", (18 U.S.C. 3500(b)), but the court was obligated to "excise the portions of such statements which do not relate to the subject matter of the testimony of the witness." 18 U.S.C. 3500(c). Appellant was not entitled to access to statements, or portions thereof, which did not relate to the subject matter of the testimony of the witness or which failed to meet the specifications of Sec. 3500(e), (which defines statements as used in the Act). Palermo v. United States, (1959) 360 U.S. 343, 354.

A comparison of Court Exhibits C, I and K with the direct testimony of Mrs. Deegan, (RIII 592-646), and Hart, (RIII 3487-3492), readily demonstrates the propriety of the action taken by the trial court.

V. THE CONSPIRACY CONTINUED UNTIL THE INDICTMENT WAS FILED, AND THE STATEMENTS OF THE CONSPIRATORS AFTER MAY 11, 1960 WERE PROPERLY ADMITTED.

Appellant Weinstein's Specification of Error No. VI is that the trial court erred in admitting hearsay after the termination of the conspiracy. This contention is based upon a misconception of the law of conspiracy and a misconstruction of the indictment.

Weinstein asserts that "the conspiracy ends with the last overt act alleged and proved" (Br. p. 131) (emphasis supplied). This is not the law. An overt act "is an outward act done in pursuance of the crime and in manifestation of an intent or design, looking toward the accomplishment of the crime." Chavez v. United States, (C.C.A. 9, 1960) 275 F. 2d 813, 817. The crime of conspiracy is complete with the doing of the overt act. Fiswick v. United States, (1946) 329 U.S. 211, 216; Hyde v. United States, (1912) 225 U.S. 347, 359; Hoffman v. Holden, (C.C.A. 9, 1959) 268 F. 2d 280, 295, but, once established, it is presumed to continue until the contrary is demonstrated, United States v. Bentvena, supra, p. 947; United States v. Stromberg, supra, p. 263, cert.den. sub nom. Lessa v. United States, 361 U.S. 863, and it does not terminate until its object has been accomplished. Pinkerton v. United States, supra, p. 646; United States v. Kissel, supra, p. 607; United States v. Bletteman, (C.C.A.

2, 1960) 279 F. 2d 320, 322; Cleaver v. United States, (C.C.A. 10, 1956) 238 F. 2d 766, 769; Ferris v. United States, (C.C.A. 9, 1930) 40 F. 2d 837, 839. Particularly appropriate here, in light of Weinstein's contention, is the following:

> "The period of the conspiracy was a matter for trial and for proof and the burden was on appellant to show his disassociation from the conspiracy, once he had been connected, as he was, to it." Strauss v. United States, (C.C.A. 5, 1963) 311 F. 2d 926, 931, cert. den. 373 U.S. 910. h/

Appellant appears to confuse this palpably reasonable conclusion with the problem of when the statute of limitations shall start to run, which is the date of the last overt act alleged and proven. Fiswick v. United States, supra; Huff v. United States, (C.C.A. 5, 1951) 192 F. 2d 911, 915, cert.den. 342 U. S. 946; United States v. Johnson, (C.A.A. 3, 1947) 165 F. 2d 42, 45, cert. den. 332 U. S. 852, rhrg. den. 333 U.S. 834. Cf. Grunewald v. United States, (1957) 353 U. S. 391.

However, in the instant case, the indictment charged, and the evidence demonstrated, (See pp. 4-27 supra), a continuing conspiracy. (See Indictment; Cf. United States v. Kissel, supra; Grunewald v. United States, supra, at p.406, fn. 20). And so long as the conspiracy continued declarations

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h/ . . . "the only purpose of proof of the overt act is to eliminate the possibility of abandonment of the conspiracy." Castro v. United States, (C.C.A. 5, 1961) 296 F.2d 540, 543.

of conspirators were admissible against co-conspirators not present if made in furtherance of the objects of the conspiracy. Delli Paoli v. United States, (1957), supra, p.237.

Concealment was a necessary part of the conspiracy in the instant cause, as distinct from a "subsidiary objective of the conspiracy." (See Krulewitch v. United States, (1949) 336 U.S. 440, 443). And here there was evidence in the record "that the conspirators agreed to conceal the conspiracy by doing what was necessary and expedient to prevent its disclosure." 184/ (See Lutwak v. United States, (1953) 344 U.S. 604, 616). These efforts to conceal events were essential to the program of continuing the staged accidents, which the co-conspirators were still attempting to do in late 1960, 185/ for if the facts became known there obviously would be little likelihood of continuing in the program of milking the insurance companies. Note, for example, that Weinstein, as late as December 30, 1960, paid Saunders' hospital bill in order to close that matter from any untoward inspection, even if only from a bill collector.186/ "Secrecy and concealment are essential features of successful conspiracy", (Blumenthal v. United States, supra, p. 557), and in this case were crucial to its success.

In Grunewald v. United States, supra, the government asked the court to distinguish Krulewitch and Lutwak, both supra, on the ground that in those cases there had been an attempt to imply a conspiracy to conceal while in Grunewald, the government said, there was an actual agreement to conceal. The court, however, found no evidence to support the government's contention. (Id. p. 402) It stated that

> "The crucial teaching of Krulewitch and Lutwak is that after the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment." Id. pp. 401-2.

But that was not the case here. Weinstein said the investigators were "just fishing", and the attempts to set up staged accidents were still continuing.

Grunewald points up the difference, for it is there said:

> By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained. 353 U.S. 405.

Grunewald speaks of a hypothetical situation, apparently found in the government's brief, which is most analogous to the instant case. 353 U.S. 406-7, fn. 20. In meeting that hypothetical the court points out that "acts of

concealment could have been in furtherance of this aim by enabling the ring to stay in business so that it could get new cases." Id. p. 407 fn. 20. So, here, the acts of concealment were to enable the ring to stay in business so that they could stage more accidents.

With one exception, a portion of item 4 (Br. pp. 131), the statements complained of were demonstrative of the attempt to "stay in business" by keeping the participants quiet.

A. THE EVIDENCE WAS ADMISSIBLE EVEN IF CONSPIRACY DEEMED TO HAVE ENDED ON MAY 11, 1960

Weinstein refers to a "number of hearsay statements", (Br. p. 120), which he claims were improperly admitted over his objection repeatedly and timely made. Yet upon analysis items 1(a), 1(b), 1(c), (2) and (4) were either not hearsay or admissible under exceptions to the hearsay rule, having nothing to do with the doctrine anent declarations of co-conspirators.

Items 1(a), 1(b), 1(c) and (2), (W. Br. pp. 120-128) deal with a phone call which Boisjolie ordered his wife to place to Weinstein and the events which followed immediately thereafter. The placing of the phone call to Weinstein, and the resultant comments by him to Boisjolie's wife, was not only admissible but was direct evidence. United States v.

Benjamin, supra, fn. 3 at p. 1080; United States v. Bucur, (C.C.A. 7, 1952) 194 F.2d 297, 303-4; Jarvis v. United States, (C.C.A. 1, 1937) 90 F.2d 243, 245, cert. den. 302 U.S. 705; Van Riper v. United States, (C.C.A. 2, 1926) 13 F.2d 961, 968, cert. den. sub nom. Ackerson v. United States, 273 U.S. 702. Cf. Armstrong v. United States, (C.C.A. 9, 1964) 327 F.2d 189, 197. The subsequent appearance of Knippel and Lassiter following the telephone call, even if the conspiracy be deemed ended, was an act, as distinct from a declaration, and, hence, admissible. Lutwak v. United States, supra, p. 618. The comments made by Knippel and Lassiter upon their appearance, (actually two appearances, one at 11:30 PM the evening of the phone call, and the second at 5:30 AM the following morning), were likewise admissible as they were "contemporaneous with a non-verbal act, independently admissible, relating to that act and throwing some light upon it." United States v. Annunziato, (C.C.A. 2, 1961) 293 F.2d 373, 377, cert. den. 368 U.S. 919.

Item 4, (Br. pp. 130-1), was admissible as direct evidence tending to show that the conspiracy still existed as of November, 1960. (RIII 1246/22 - 1249/18). Weinstein did not object. (RIII 1249). Having failed to object at the time he cannot be heard to complain now. Fiano v. United States, (C.C.A. 9, 1959) 271 F.2d 883, 885, cert. den.

361 U.S. 964, rhrg. den. 362 U.S. 925; Trice v. United States, (C.C.A. 9, 1954) 211 F. 2d 513, 519, cert. den. 348 U.S. 900.

B. THE JOHNSTONE STATEMENT WAS PROPERLY ADMITTED, BUT IF NOT THE ERROR WAS HARMLESS.

If the conspiracy be deemed to have ended May 11, 1960 the Boisjolie testimony concerning Johnstone's statement, Item 3, (Br. pp. 128-9), was properly admitted. It certainly was admissible as against Johnstone, the declarant, and hence properly in the case. Lutwak v. United States, supra, p.618. The trial judge immediately instructed the jury, ("under the admonition given to the jury previously"), that it was not binding on the other defendants (which included Weinstein) "unless it's subsequently tied in with some matter." (RIII 1252/11-14), and again cautioned the jury in this regard in his final charge. (RIII 5864/13-19).

Even if the Johnstone episode, as testified to by Boisjolie, was improperly admitted it is difficult to see how any possible prejudice could have arisen, as to Weinstein, for the jury had already received direct evidence of a similar activity at about this time on the part of Weinstein from the Deegans. Cf. Cohen v. United States,(C.C.A. 9, 1944) 144 F. 2d 984, 989, cert. den. 323 U. S. 797, rhrg. den. 324 U.S. 885.

In light of the overwhelming evidence of Weinstein's guilt apart from this statement, (which was really merely cumulative evidence to the Deegan episode), the particular statement could have had little effect upon the jury and upon the substantial rights of Weinstein and is not ground for reversal. 28 U.S.C. Sec. 2111; Kotteakos v. United States, supra, p. 764; Palmer v. Hoffman, (1943) 318 U.S. 109, 116; Berger v. United States, (1935) 295 U.S. 78, 82; Ahlstedt v. United States, (C.C.A. 5, 1963) 315 F.2d 62, 66-7, cert. den. 375 U.S. 847; Starr v. United States, (C.A.D.C., 1958) 264 F. 2d 377, 381, cert. den. 359 U.S. 936.

If any error exists with respect to the admission of evidence of events after May 11, 1960, it is to the prejudice of the government. Until George Barnard received his "kick-back" from the participants in the accident of February 16, 1960, (Counts I and II), that portion of the scheme had not been completed. But evidence demonstrating that as of January 20, 1961 there was still money due George Barnard from D. McCoy was admitted only for a limited purpose. (RIII 3430/16-24). We believe that evidence should have been admitted for all purposes, since not until that date did the conspiracy terminate. See Strauss v. United States, supra.

VI. THE TRIAL COURT PROPERLY INSTRUCTED ON THE SUBJECT OF CONSPIRACY

Appellant Weinstein's Specification No. VII is that the trial court erred in instructing the jury on the proof of the existence of conspiracy. He attacks but one sentence of the trial court's extensive instructions on conspiracy and states that "the instruction cannot be the law," (Br. p.139), although he cites no authority to support his contention.[1/]

We do not agree. Nor did Judge Medina when charging the jury in United States v. Foster, (S.D.N.Y., 1949) 9 F.R.D. 367, 378.

Learned Hand, C.J., stated of the Foster trial that "The record discloses a trial fought with a persistence, an ingenuity and - we must add - with a perversity, such as we have rarely, if ever, encountered." United States v. Dennis, (C.C.A. 2, 1950) 183 F. 2d 201, 234, (affirmed 341 U.S. 494, but this issue was not before the Supreme Court). Despite a multitude of "objections and complaints" asserted in 570 pages of briefs, (Id. p. 234), the Second Circuit made no comment on this instruction. For quite obvious reasons.

1/ "On the other hand, proof concerning the accomplishment of the objects of a conspiracy is the most persuasive evidence of the conspiracy itself." RIII 5862/9-12. Br. p. 138-9.

When coupled with the balance of the instructions addressed to the subject of conspiracy which were given by the trial court, (RIII 5858/8 - 5867/3), it correctly states the law.

VII. THE TRIAL COURT DID NOT ERR IN LIMITING THE TIME OF FINAL ARGUMENT j/

Appellants contend that they were deprived of the right to counsel, (guaranteed by the Sixth Amendment), in that the court limited the time for argument to: one hour, Weinstein; one hour, George Barnard; one-half hour, John Barnard; one-half hour, Knippel; and one-half hour, Lassiter; or a total of three and one-half hours for all appellants. (This was in addition to the two and one-half hours equally divided amongst the remaining co-defendants who have not appealed.) The Government was allotted two and one-half hours. (RIII 5696/10-19) In fact Weinstein took 1 hour 6 minutes, George Barnard 20 minutes (of his allotted hour), John Barnard 25 minutes, Knippel 20 minutes, Lassiter 26 minutes, and the Government a total, (for opening and closing), of 1 hour 21 minutes. (Supp. RI 79-80)

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j/ NOTE: All five appellants have raised this point: Weinstein's Specification of Error No. VIII; George Barnard's Specification of Error No. I; John Barnard's Specification of Error No. II; Knippel's Specification of Error No. II; and Lassiter's Specification of Error No. II. We combine our answer to all five appellants in this section.

It is axiomatic that the limitation of time for arguments of counsel is within the sound discretion of the trial judge. Butler v. United States, (C.C.A. 8, 1963) 317 F. 2d 249, 257, cert. den. 375 U.S. 838; Cases v. United States, (C.C.A. 1, 1942) 131 F. 2d 916, 925, cert. den. 319 U.S. 770, rhrg. den. 324 U.S. 889; United States v. Kay, (C.C.A. 2, 1939) 101 F. 2d 270, 272, cert. den. 306 U.S. 660; Capriola v. United States, (C.C.A. 7, 1932) 61 F. 2d 5, 11, cert. den. sub nom. Walsh v. United States, 287 U.S. 671. The only question here is: Was there an abuse of discretion? We think not.

Appellants essentially complain that more time was needed because of the number of witnesses, (109), number of defendants, (10), number of exhibits, (407), and a record of over 6000 pages upon a nine count indictment. Yet in Butler v. United States, supra, it was found to be no abuse of discretion to limit argument to a total of 15-1/2 hours for 30 defendants who went to trial on a 33 count indictment, a record of 14,373 pages with 140 witnesses and a "multitude of exhibits". Id. pp. 252 fn. 4, 257. And, as noted in Butler, the trial court's limitation of counsel for 43 defendants to a total of two hours for final argument was upheld in Capriola v. United States, supra, although there were 59 defendants who went to trial, (of whom 16 were dismissed by the court), and 109 overt acts.

It is true that in Capriola the record was devoid of any objection to the court's ruling on the time allotted and there was no assignment of error based thereon. However, the conjunctive nature of the court's holding makes it clear that this was an additional or alternative - not the sole - ground for denying the claim of an abuse of discretion.

It should be noted that there is no federal case of which we are aware where argument in excess of 20 minutes is found to be an unreasonable restriction upon time. It is further noteworthy that recent federal cases handle the matter quite summarily. See Hodge v. United States, (C.C.A. 5, 1959) 271 F. 2d 52, cert. den. 361 U.S. 961; Cases v. United States, supra. k/

In Parker v. United States, (C.C.A. 6, 1924) 2 F. 2d 710, relied on by Weinstein (Br. p. 145), the appellate court did not hold that argument limited to 20 minutes was an unreasonable restriction, as Weinstein would have us believe. (Br. p. 145). Reversal was ordered there because of argument and advocacy on the part of the trial judge, while charging the jury, "beyond the permissible limit." Id. p. 711.

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k/ Cf. United States v. Crosby, supra. 50 count indictment, 15 week trial, 9000 page transcript, Held: "the trial judge was acting completely within his discretion and in furtherance of his duty to expedite the trial when he cut off Mittleman's attorney after he had gone more than a half hour over his self-requested five hour summation period." Id. p. 944, (emphasis supplied).

Kolp v. United States, (C.C.A. 6, 1924) 2 F. 2d 953 is referred to in Capriola, supra, p. 11, as a case in which the appellate court held that a limitation of argument to 10 minutes was an abuse of discretion. However, a careful reading of Kolp indicates that the Sixth Circuit felt that a limitation of argument to 10 minutes would have been unreasonable, but that an extension of 5 minutes, for a total of 15 minutes, no objection appearing, would not have been.

We do not comment upon the many state cases cited in Weinstein's brief for the reason that the plenitude of federal authority on the subject establishes the federal rule - that with which we are here concerned.

In Butler, supra, the trial court allotted to counsel representing but one defendant an hour and 15 minutes, to counsel representing two defendants an hour and 15 minutes, to counsel representing three defendants one hour 30 minutes, to counsel representing six defendants two hours, and to counsel representing seven defendants but two and one-half hours. The court discussed the various possibilities of time allocation with the attorneys, as the trial court here attempted to do [187] and, in Butler, the majority of counsel consented to the time allocation. (317 F. 2d at 257). To that extent Butler differs from the instant case. However, in this cause the trial court asked counsel for Weinstein how much time he wanted and received the reply "at least 45

minutes". (RIII 5593/25 - 5594/10) Weinstein was allotted one hour and, on advice of this, made no comment at the time. (RIII 5665/19-20)

Under all the circumstances present in this cause, and upon the authorities above referred to, we submit that the trial court did not abuse its admitted discretion in limiting argument of the ten counsel involved to a total of six hours.

We suggest that the reason modern authorities such as Butler, Crosby, Hodge and Cases, all supra, find no abuse of discretion in the curtailment of argument is because our modern courts recognize the validity of the old saw:

"No sinner is saved after the first ten minutes."

VIII. THIS CAUSE WAS PROPERLY IN THE FEDERAL COURT.

Appellant Weinstein's Specification of Error No. IX is that the matters involved were primarily of local concern. Unfortunately we cannot discern from Weinstein's brief in what respect there is alleged to be error, unless it be that the trial court erred in failing to grant his several motions for a separate trial. (See Br. pp. 150, 151, 154). That issue we have already laid to rest at pp. 57-62, supra, and no more need be said here.

If this Specification of Error is intended to contest the jurisdiction of the federal court in this cause Mr. Justice Whitaker seems to have answered that point quite succinctly. "The fact that a scheme may violate state laws does not exclude it from the proscription of the federal mail fraud statute, . . . " Parr v. United States, (1960) 363 U.S. 370, 389.

It may well be true, and if not it should be, that the matters here involved were of local concern. But appellant was charged with, and the evidence amply supports conviction for, violations of the federal mail fraud and conspiracy statutes. Title 18 U.S.C. Secs. 371, 1341. Since the gravamen of the offenses was an abuse of the mails it was primarily a federal matter, and properly prosecuted as such.

IX. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING GEORGE BARNARD'S MOTION FOR CONTINUANCE

Appellant George Barnard's Specification of Error No. II is that the trial court erred in denying his motion for continuance until he could be tried under an indictment charging violation of Section 1503, Title 18 United States Code. He alleges that the failure to grant this motion deprived him of his right to counsel.

Essentially appellant complains that because he was incarcerated during the course of trial, and for twelve days

before commencement thereof, he was unable to "prepare his defense." (Br. p. 21) Yet he was at liberty from January 26, 1961, (the indictment was filed January 20), until September 1, 1961 and thereafter was never denied the right to confer with his attorney, (appointed February 20, 1961), who was able to talk with him at all times.[188]

This court has already decided that appellant's contention has no merit. Spaulding v. United States, (C.C.A.9, 1960) 279 F. 2d 65, 66, cert. den. 364 U.S. 887. See also Joseph v. United States, (C.C.A. 9, 1963) 321 F. 2d 710, cert. den. 375 U.S. 977; Torres v. United States, (C.C.A. 9, 1959) 270 F. 2d 252, 253-5, cert. den. 362 U.S. 921.

Counsel for appellant admitted that he had been "diligently engaged in the preparation of the defense" for six to seven months prior to the trial, including a thorough analysis of the list of government witnesses furnished appellant by government counsel, and that the initial postponement from a May to September date, "was to give us more time to prepare." That he had done so finds strong support in the record for "his actions showed that he had spent a considerable amount of time on the law of the case for he had many comments and objections to make", Torres v. United States, supra, p. 255, and vigorously contested every step of the way leading to final disposition of the case. Avery v. Alabama, (1940) 308 U.S. 444, 450.[189] The time and effort expended

by counsel for appellant here, both in the seven months of preparation and the energetic participation at trial, make it clear that the constitutional guarantee of assistance of counsel was more than satisfied.

The motion for continuance is purely a matter within the discretion of the trial judge and ordinarily will not be reviewed. Avery v. Alabama, supra, p. 446; Joseph v. United States, supra, p. 713. We submit that there has been no abuse of that discretion in the instant case.

Since appellant's Specification of Error No. II goes to the exercise of the court's discretion at the time the motion to continue was made, subsequent events are immaterial. Accordingly we do not comment on appellant's paragraph C, (Br. pp. 21-22), except to say that the foregoing authorities are equally conclusive if it be deemed that appellant asserts error by reason of the trial court's denial of that particular ground for new trial, and to note that " . . . the mere fact that the government fails as to one or more counts does not mean that the indictment was improperly obtained or secured in bad faith." United States v. Bentvena, supra, p. 950.

X. KNIPPEL WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

Appellant Knippel's Specification of Error No. III is that he was denied the effective representation of counsel when the trial court refused to permit a continuance upon the substitution of counsel at the start of trial.

Preliminarily we note thst appellant states that his "trial counsel was appointed after the jury had been selected and just previous to trial." (Br. p. 10) Only by use of the word "trial" can this statement come close to the fact. The fact is that appellant was represented by counsel, from the time of his arraignment on February 20, 1961 at all stages of the proceedings. After the empanelling of the jury there was a substitution of counsel, with appellant's consent. At the conclusion of the government's case there occurred still another substitution, again with appellant's consent. 190/

The issue here is whether or not appellant was deprived of the effective assistance of counsel because of the substitution, (with his consent), after the empanellment of the jury. For the reasons which follow we submit that the answer is - he was not.

Appellant had been represented by one Carskadon for almost seven months before trial commenced. Upon empanellment of the jury he was allowed to withdraw and Messrs. Atchison and Ransom, with appellant's consent, were appointed in his

stead. At the time of the substitution Carskadon volunteered his file and his assistance. After empanelling the jury on Thursday, September 14, court recessed until Monday, September 18. On Tuesday, September 19, court recessed early (approx. 3:30 PM) and did not reconvene until 9:30 AM Thursday, September 21. Atchison, one of the co-counsel appointed in substitution of Carskadon, was not without some independent knowledge of the case for his partner had already been working on Weinstein's defense.[191]

Joseph v. United States, supra, is the only one of the authorities cited by appellant which is of assistance in resolving the issue here. In Joseph the defendant was represented by counsel of his own choice at all relevant times in the district court, as was appellant here; and there, as here, the defense was vigorous and able. (Id. p. 711) Counsel for Joseph took the position that one week's preparation for trial of a case involving lengthy punishment was insufficient as a matter of law. This court did not agree and held that Joseph had had the effective assistance of counsel. Cf. United States v. Bentvena, supra, pp. 934-8; Gray v. United States, (C.A.D.C. 1962) 299 F. 2d 467, 468. We submit that the facts compel the same conclusion here.

Since United States v. Bergamo, (C.C.A. 3, 1946) 154 F. 2d 31, and United States v. Vasilick, (M.D. Penn. 1962) 206 F. Supp. 195, cited by appellant, are adequately distinguished by this court in Joseph, (see fn. 1, 321 F. 2d 712), we comment briefly only upon Releford v. United States, (C.C.A. 9, 1961) 288 F. 2d 298 and Maye v. Pescor, (C.C.A. 8, 1947) 162 F. 2d 641, also cited by appellant. In Releford this court reversed because the trial court had forced the defendant to trial with counsel not of his choosing and who was not even appointed to represent him. In Maye the court found no error in that the defendant had ample opportunity to consult with counsel before entering a plea of guilty. Palpably no comparable fact situation to that in the instant cause.

We believe most nearly analogous to the situation here presented is that found in Arellanes v. United States, (C.C.A. 9, 1962) 302 F. 2d 603, cert. den. 371 U.S. 930, where just prior to trial, counsel, who had represented Arellanes for almost seven weeks prior to trial, was permitted to withdraw and Arellanes proceeded without counsel. This court held that the trial judge "proceeded properly" in denying a further continuance at that time. (Id. p. 610). Cf. Bailey v. United States, (C.C.A. 9, 1960) 282 F. 2d 421, 427, cert. den. 365 U. S. 828; and Sanchez v. United States, (C.C.A. 9, 1962) 311 F. 2d 327, 332-3.

Glasser v. United States, (1942) 315 U. S. 60 and Powell v. Alabama, (1932) 287 U. S. 45, cited by appellant (Knippel Br. p. 10) are not in point. In Glasser, at the start of trial counsel for Glasser was appointed to represent a co-defendant, as well as Glasser, despite Glasser's objection and despite the fact the court was apprised of a possible conflict of interest between Glasser and the co-defendant. In Powell defendants had had no attorney named or definitely designated to represent them until the very morning of trial. No opportunity was given to investigate the facts and the representation was rather pro forma than zealous and active. 287 U. S. at 58. While the rule of these decisions is exemplary it has no application to these facts.

Under the facts of this case it can only be concluded that the constitutional guarantee of the effective assistance of counsel was, as with George Barnard, fully satisfied.

XI. THERE WAS NO ERROR IN THE DENIAL OF APPELLANTS' MOTION FOR NEW TRIAL BASED UPON THE GROUND OF ALLEGEDLY NEWLY DISCOVERED EVIDENCE.

Appellants George Barnard, John Barnard, Knippel and Lassiter each claim the trial court erred in denying their respective motions for new trial upon the ground of newly discovered evidence concerning the qualifications of two jurors who were empanelled to, and did, try the case. (Respectively Specifications of Error Nos. III, IV, IV and III)

The short answer to these contentions is that the trial court concluded that the alleged evidence was not "newly discovered" (Supp. RI p. 66/27-32), and properly so, having found that appellants either knew, or would have known upon the exercise of reasonable diligence, of the matters they alleged. 192/

Appellant "disputes the validity" of these findings of fact. (Br. p. 23).

> But it is not the province of this court or the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact. (cites omitted) While the appellate court might intervene when the findings of fact are wholly unsupported by evidence, (cites omitted), it should never do so where it does not clearly appear that the findings are not supported by any evidence.
> United States v. Johnson, (1946) 327 U.S. 106, 111-2. Cf. Gallegos v. United States, (C.C.A. 9, 1961) 295 F. 2d 879, cert. den. 368 U.S. 988; Apel v. United States, (C.C.A. 8, 1957) 247 F. 2d 277, 285.

Before demonstrating that the findings of fact are wholly supported by the evidence it should be noted that "In order to sustain a motion for new trial on the ground of newly discovered evidence, a defendant must make it satisfactorily appear that his failure to discover such was not due to lack of diligence on his part". Ferina v. United States, (C.C.A. 8, 1962) 302 F. 2d 95, 112, cert. den. 371 U.S. 819; United States v. Costello, (C.C.A. 2, 1958) 255 F.2d 876, 879,

cert. den. 357 U. S. 937; United States v. Soblen, (S.D.N.Y., 1961) 203 F.Supp. 542, 564, cert. den. 370 U. S. 944. Questions of credibility are clearly for the trial judge, United States v. Gantt, (C.C.A. 4, 1962) 298 F. 2d 21, 22, and there must be a showing in the record of facts from which the court can infer due diligence, and counsel's affidavit here, (Supp. RI pp. 1-4), does not constitute such a showing. Balestreri v. United States, (C.C.A. 9, 1955) 224 F. 2d 915, 917. Neither does the record.

The trial court could well have concluded that appellants knew of the facts as to which they complain, but it could hardly fail to conclude that they could have known had they exercised any effort at all, let alone reasonable diligence.[193] Under the circumstances the motion was properly denied.

As to the evidence, that which was developed at the hearing after remand, appellants either misconstrue its effect, or mistake its import, when they find it lacking to support the findings they contest. A short perusal of the transcript indicates that all the contested findings are amply supported.[194]

We do not comment on the several cases cited by appellants in support of these specifications of error for the reason that even the small portions quoted in appellants' briefs make it evident that they are not in point.

There is so little merit to these specifications of error that one cannot help but recall those aptly descriptive lines from Macbeth:

> : it is a tale
> Told by an idiot, full of sound and fury,
> Signifying nothing.
>
> Act V, Sc. 5, 11. 26-28

C O N C L U S I O N

Appellants had a fair trial. The record supports the verdicts in every respect, and the cause was submitted to the jury under correct instructions. We respectfully submit that the judgments of conviction should be affirmed as to each appellant.

DATED: SAN FRANCISCO, CALIFORNIA, MAY 7, 1964.

Respectfully submitted

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C E R T I F I C A T E

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A. LAWRENCE BURBANK

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Special Assistant to the
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A P P E N D I X

APPENDIX

EXPLANATORY NOTE REGARDING TRANSCRIPT REFERENCES

Since there is a Transcript of Record (3 volumes), a Supplemental Transcript of Record (2 volumes) a Second Supplemental Transcript of Record, and a Supplemental Transcript of Record containing Transcript of Hearing after Remand (2 volumes), and since the pagination is not consecutive throughout these several volumes, the following abbreviations will be employed in this Appendix where appropriate. Transcript of Record: RI, RII, RIII, followed by page number and line; Supplemental Transcript of Record: Supp. R.I, Supp. R. II, followed by page number and line; Second Supplemental Transcript of Record: 2 Supp. R., followed by page number and line; and Supplemental Transcript of Record containing Transcript of Hearing after Remand; Tr. Hrg. I, Tr. Hrg. II, followed by page number and line.

TRANSCRIPT REFERENCES

Reference Number	
1.	RIII 785/7-788/8; 1113/12-25; 5391/13-23.
2.	RIII 2315/17-2316/12; 2317/15-25; 2318/4-5; 2486/20-23; 2497/7-9; 2498/14-20; 5375/20-5376/7; Exs. 85, 86, 88A, 88B, 88C.
3.	RIII 2317/16.
4.	RIII 2340/19; 2344/7-13; 2355/21-25.
5.	RIII 2340/19-22; 2366/8-2367/20.
6.	RIII 2343/4-9; 2395/5-6.
7.	RIII 2343/4-16; 2365/11-16.
8.	RIII 4442/19-4443/24; Ex. 471 pp. 5,6.
9.	RIII 4444/5-11.
10.	RIII 2408/23-2409/3; 5420/6-19; Ex. 80B.
11.	RIII 2316/20-24; Ex. 85.
12.	RIII 2535/10-12; 2539/1-3; 2539/10-11; 2541/5; 2547/21-23; 5417/18-20.
13.	RIII 5376/16-20; 5398/20-5399/16; Exs. 89, 510.
14.	RIII 2527/16-22.
15.	RIII 2739/1-11; 2847/1-16; Ex. 88J.
16.	Exs. 87, 88 p. 5/18-23; 88 p. 13/18-19; 88 p. 25/16-21; 88A, 88B, 88H, 88I.
17.	RIII 1102/22; 1104/3-6; 2317/22; 4602/7-10; 4740/23-4742/18; 5262/17-21; 5287/8-9; Ex. 98 p. 10.
18.	RIII 5287/13-5288/10; Ex. 98 p. 10.

TRANSCRIPT REFERENCES

Reference Number	
19.	RIII 5229/9-5230/7; 5316/17-5317/21; Ex. 97 p. 14; Ex. 98 p. 4-5.
20.	RIII 4602/7-18; 4604/23-4605/11.
21.	RIII 4553/16-25; 4742/22-25; 4746/11-17; 4750/1-10; 5231/20-5232/13; 5246/2-8.
22.	Exs. 108, 109, 110, 110A, 110B, 110C, 485A, 485B, 485C, 485D.
23.	RIII 4962/19-22.
24.	RIII 5002/1-24; Exs. 108, 109, 110, 110A through 110HH, 500A through 500H.
25.	RIII 971/1-7; 985/1-986/2; 2741/25-2743/17; 2751/1-16; 4752/13-18; 4759/21-22; 5369/8-9; 5391/5-6; 5391/13-20; 5449/21-5450/6; 5454/2-5455/15; Exs. 21A through 21L, 25, 26, 94, 95, 96, 96A.
26.	RIII 2554/8-2555/20; 2560/23-2561/3; 2565/22-2566/18; 2567/22-2568/6; 4748/20-4749/6; Exs. 92, 92A, 93, 93A.
27.	RIII 759/2-12; 760/24-761/8; 779/5-7; 780/11-781/19; 785/19-786/18; 788/1-8; 1099/22-1100/15.
28.	RIII 309/3-21.
29.	RIII 884/13-886/11; 889/12-22; Exs. 5, 10, 11.
30.	RIII 883/7-15; 894/14-895/1; 896/11-897/18; 3396/2-13; 5068/20-22; Exs. 4, 12, 13, 155J.
31.	RIII 755/22-756/14; 757/17; 758/3-4; 903/2-16; Exs. 4, 15, 16.
32.	RIII 156/14-158/16; 224/18-25; 225/23-226/14; 228/7-229/18; 238/5-239/25; 243/6-25; 244/25-245/14; 597/13-598/15; 766/1-5; 760/21-761/8; 1093/14-1094/13.

TRANSCRIPT REFERENCES

Reference Number	
33.	RIII 158/13; 593/4-10; 756/2-6; 1086/2-6; Ex. 402.
34.	RIII 158/15-16; 225/8-19; 247/5-6; 592/19-25; Ex. 402.
35.	RIII 158/11-22; 298/15-20; 607/13-22; 608/13-18; 756/7-10; 764/12-765/1; 1088/12-17; 1100/24-25.
36.	RIII 253/1-5; 461/25-462/15; 604/1-3; 606/15-19; 611/9-612/4; 689/1-4.
37.	RIII 254/3-6; 612/7-9.
38.	RIII 255/3-22; 441/11-16; 444/2-5; 451/25-452/1; 610/9-12; 766/16-25.
39.	RIII 256/2-257/17; 259/9-15; 262/6-263/13; 609/2-610/1; Ex. 5.
40.	RIII 264/2-266/15; Ex. 5.
41.	RIII 292/10-293/20; 295/1-17; 608/7-9; 610/3-4; 615/8-16; 616/25-618/14; 658/22-25; 707/8-13; 717/9-16; 4373/19-4374/13; 267/2-7.
42.	RIII 624/13-625/7.
43.	RIII 283/18-284/5; 465/2-467/5; 4709/19-20; 4710/22-23; 5164/20-22.
44.	RIII 273/14-276/16; 917/19-920/2; 927/13-17; 934/4-935/2; 936/19-938/7; 959/16-968/17; 4697/15-16; Exs. 6, 7, 16, 18, 19, 20A through 20M.
45.	RIII 644/23-645/5.
46.	RIII 282/19-284/11; 284/12-15; 287/24-288/3; 630/6-631/10.
47.	RIII 4711/15-4712/20; 5165/14-17; Exs. 147B, 488; 4709/21-4711/10; 5153/5-5155/12.

TRANSCRIPT REFERENCES

Reference Number	
48.	RIII 5163/8-5164/13; 5165/14-22; Exs. 18, 19, 147A.
49.	RIII 1010/6-7; 5164/12-13; 5627/24-5628/24; 5638/21-5639/9.
50.	RIII 913/1-4; 937/2-10; 954/9-14; 5636/9-15.
51.	RIII 593/4-6; 756/2-4; 1076/10-13; 1086/5-6; 1410/20-22; 1411/16-19; 1435/4-6.
52.	RIII 1119/8-1120/7; 1120/24-1122/15; 1420/4-1422/13; 1424/18-23; 1435/4-6.
53.	RIII 1053/6-1054/1; 1077/12-25; 1410/25-1411/15; 1419/1-12; 1421/5-1422/13; 1438/5-25; 1730/8-23; 1801/5-7; Exs. 32A, 32B.
54.	RIII 1738/22-1739/14; 1742/23-1743/16; 1749/21-1751/23; 1819/4-6.
55.	RIII 1742/12-1743/10.
56.	RIII 1750/1-1752/7; 1787/2-25; 1795/6-10.
57.	RIII 1549/13-1551/8; 1554/2-1555/22.
58.	RIII 1054/8-10; 1425/25-1426/4; 1542/15-21; 1563/8-11; 1730/11-14.
59.	RIII 1440/9-1441/1; 1479/5-22; 1542/2-1543/13; 1730/8-1731/23.
60.	RIII 1427/8-21; 1428/2-25; 1440/9-1441/1; 1479/23-1480/25.
61.	RIII 3487/13-3491/25; 3494/1-12; 3570/20-24; 3579/22-3583/12; 3590/7-18.
62.	RIII 1422/11-25; 1476/7-10; 1542/9-11; 1576/10-25; 1659/1-14; 1660/6-1662/22; 1733/20-1734/1; 1740/3-11; Ex. 420.

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63.	RIII 1576/10-13; 1663/10-18; 1675/11-15.
64.	RIII 1567/6-19; 1675/16-20.
65.	RIII 1753/24-1755/25.
66.	RIII 1595/4-12; 1770/10-19.
67.	RIII 1568/3-10; 1571/3-14; 1572/2-7; 1756/25-1757/3; 1796/6-8.
68.	RIII 1520/20-25; 1591/12-1595/12; 1761/13-20; 4839/13-17.
69.	RIII 1763/17-1765/16; 1771/8-18; 1850/21-1851/11; Exs. 424A through G.
70.	RIII 1593/3-7; 1594/16-18; 1597/1-25; 1598/12-15; 1598/24-1599/2; 1599/11-19; 1600/7-10; 1681/2-1682/10; 1683/18-1684/25; Exs. 421A through H.
71.	RIII 1768/13-1770/4.
72.	RIII 1430/4-16; 1468/5-8; 1470/24-1471/3; 1496/18-1497/20; 1499/5-15; 1501/7-1502/6; 1505/5-1506/23; 1524/13-1525/8; 1525/23-1527/24; 1701/12-19; Exs. 27, 28, 29, 30, 34B, 38, 38A, 53, 54, 55, 56, 57, 57A.
73.	RIII 1430/4-25; 1459/14-1462/13; 2317/22.
74.	RIII 1431/5-1433/11; 1462/1-13.
75.	RIII 1133/25-1134/5; 1160/16-1161/5; 1176/3-1177/3; 1178/7-1179/9.
76.	RIII 1600/18; 1602/21; 1603/19-1604/9; 1772/3-18; 1849/2-7; 1852/6-8; Exs. 35, 35A, 36, 37, 39 through 50.
77.	RIII 339/18-19; 341/17-342/17; 349/9-23; 350/8-13; 351/12-352/25;

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78.	RIII 3235/2-25; 3248/17-19; 3254/5-7; 3256/8-13.
79.	RIII 240/13-14; 792/7-18; Deegan: 339/18-19; 341/17-343/25; 348/1-350/3; 351/12-352/25; Kerr: 3235/2-3236/5; 3248/14-19; 3249/15-21; 3254/5-3256/13; 3257/24-3260/22; Walker: 3058/19-3060/17; 3079/1-13; 3080/23-3081/10.
80.	RIII 349/9-23; 350/8-13; 351/12-15; 352/14-25; 3055/3-18; 3056/16-3057/9.
81.	RIII 3057/10-16; 3061/21-3062/13; 3092/10-20; 3276/4-15; 3306/8-25; 3325/6-13; 3326/8-10; 3503/20-3505/1; Exs. 111, 112, 113, 115, 116, 122, 123, 124, 125, 126, 127, 128.
82.	RIII 3114/1-20; 3115/5-3117/17; 3129/15-3130/6.
83.	RIII 3117/18-3119/14; 3121/24-3122/5; 3123/2-3125/1.
84.	RIII 3122/9-21; 3125/2-6.
85.	RIII 3224/9-21; 4839/15-17; 5116/8-5118/15; Exs. 111, 112, 113.
86.	RIII 3129/15-3130/6; 3155/18-3157/4; 3225/9-14; 3269/9-17; 5014/10-13; 5028/5-8.
87.	RIII 3226/13-3227/6; 3270/19-25; 3272/5-8; 5119/21-5121/5; Exs. 158A, 158B.
88.	RIII 3130/7-22; 3131/25-3132/16; 3137/19-23; 3159/7-22; 3162/3-5; 3163/1-3167/8; 3169/15-3170/2; 3172/14; 3199/2-3; Exs. 443A through D.
89.	RIII 3132/17-3134/14.

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Reference Number	
90.	RIII 3172/18-3173/24; 3174/14-16; 3198/13-22; 3199/2-22; 3210/11-13.
91.	RIII 3134/20-3136/17; 3172/6-17; 5263/17-20; 5327/8-5329/10.
92.	RIII 3136/18-3137/12; 3157/14-18; 3160/18-3162/2; 3162/23-3167/18; 3180/11-12; Exs. 443A through D.
93.	RIII 3137/24-3138/8; 3178/9-20.
94.	RIII 5465/21-5466/22.
95.	RIII 3199/23-3200/23; 3202/6-20.
96.	RIII 3209/23-3210/6.
97.	RIII 3186/12-3187/10; 3189/9-15; 3213/15-25; Ex. 445A.
98.	RIII 3213/6-20; Ex. 445B.
99.	RIII 3187/11-23; 3215/1-3216/15; Ex. 142.
100.	RIII 3275/18-3276/15; 3296/6-18; 3301/18-3302/8.
101.	RIII 3297/13-3299/9; 3318/1-6; 3322/6-23.
102.	RIII 1968/16-23; 1969/5-1970/12; 1975/2-6; 1975/23-25; 2054/3-16.
103.	RIII 1894/18-1895/7; 1937/21-23; 1962/1-12; 1964/6-20; 1965/4-10; 1966/11-25; 1967/24-1969/17; 3869/18-3870/16.
104.	RIII 1896/2-1898/8; 1898/24-1899/18; 1963/19-23; 1978/2-1979/16.
105.	RIII 1938/2-3; 1947/8-15; 1948/3-12; 1979/10-1980/5.

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106.	RIII 1893/13-1894/3; 1904/5-9, 1939/5-14; 1940/10-19; 1949/6-10; 1979/25-1980/3; 1981/20-25; 1982/1-14; 1987/17-1988/8; 1991/21-1992/11; 2121/17-24; 2171/15-2172/12; Ex. 66.
107.	RIII 2193/1-10; 3807/18-23; 3808/19-3811/16; 3823/23-3824/21; 3833/9-3834/22; 3835/2-3; 3839/8-17; 3840/7-12; 3844/18-21; 3846/23-3847/6; Exs. 78, 458.
108.	RIII 1893/13-1894/3; 1903/11-23; 1998/11-14; 1999/5-15; 2015/25-2016/22; 2048/4-12; 2080/18-2081/12; 2082/17-2083/4; 2158/13-2160/14.
109.	RIII 1941/12-18; 1952/21-25; 1953/18-22; 2024/7-18; 2158/13-2160/14.
110.	RIII 2173/12-2175/6; 2178/22-2179/20; Ex. 65.
111.	RIII 1941/19-21; 2127/10-2128/10; 2128/23-2129/14; 2131/1-22; 2133/20-2134/2; 2188/18-2189/22; 2227/8-2229/3; 2240/23-2241/4; 2245/8-2247/1; 2250/15-17; 2786/2-2788/2; Exs. 22, 71, 72, 73.
112.	RIII 1044/22-1047/3; 1049/11-17; 5006/6-5007/8.
113.	RIII 2551/12-19; 2552/4-25; 2740/17-18; 2741/1-5; 2742/22-2743/17; 2745/18-19; 5367/5-6; Exs. 95, 96.
114.	RIII 1941/22-1943/13; 2238/19-2239/10; 2248/8-15; Exs. 67, 68, 79, 80.
115.	RIII 1874/1-15; 1876/7-13; 1876/21-1877/16; 1877/23-1878/7; 1888/25-1889/19; 1944/14-1945/14; Exs. 61, 62, 63, 64.
116.	RIII 2317/15-17; 2838/13-2839/1; 2845/17-23.

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Reference Number	
117.	RIII 2797/22-2798/9; 2802/18-2803/11; 2839/2-5; 2845/24-2846/2.
118.	RIII 2804/2-18; 2805/7-13.
119.	RIII 2795/1-2796/4; 2799/3-22; 2818/2-11.
120.	RIII 2794/19-25; 2796/6-13; 2850/6-21; 2851/18-2852/3;3360/18-20; 3362/3-12; 3393/10-3394/4; 3394/13-3395/1; 3402/24-3403/7.
121.	RIII 2849/25-2850/1; 2852/14-2853/22; 2856/25-2857/4; 2897/11-15; 3347/7-21;3351/8-17; 3362/22-3363/11; 3380/9-21; 3392/25-3393/6; 3395/4-10; 3413/1-4; 3436/12-16; 3438/3-4; Ex. 52
122.	RIII 2794/3-16; 2797/15-17; 2805/23-2806/9; 2849/4-2850/5;3355/23-3356/14; 3392/12-3393/6; 3438/3-4; 3446/17-18.
123.	RIII 2174/3-4; 2175/7-2176/14; 2177/16-17; Exs. 88A, 88B, 88C.
124.	RIII 2860/23-24; 3396/4-8; 3396/17-25; 3397/21-25; 3459/23-3460/5.
125.	RIII 884/13-886/11; 889/12-22; 894/19-895/1; 896/11-897/18; 3396/2-13; Exs. 4, 5, 10, 11, 12, 13.
126.	RIII 2860/17-2861/10; 3359/5-12; 3359/25-3360/13; 3397/15-20; 3398/8-11; 3399/3-16; 3401/4-24; 3436/17-19.
127.	RIII 2808/14-2809/10; 3367/13-22; 3402/11-16; 3412/17-19.
128.	RIII 2800/20-2802/6; 2832/1-13.
129.	RIII 2866/19-24; 3362/13-19; 3404/20-3405/9.

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130.	RIII 2867/6; 2904/8-10; 3368/7-15; 3373/5-8; 3405/13-18; 3406/4-6; 3509/18-3510/2.
131.	RIII 2891/13-24; 2899/3-7; 2899/20-25; 2902/20-21.
132.	RIII 2900/4-25; 2902/24-2904/10.
133.	RIII 2800/20-24; 2867/8-2868/4; 3103/23-3104/18; 3368/16-3369/10; 3406/9-3407/4; 3509/18-3510/17; 3534/9-3535/4; 3536/18-25; 3537/7-24; Exs. 131, 132, 133, 134, 136, 137, 139, 140, 140A.
134.	RIII 3408/11-3410/6; 3410/16-20; 3413/9-3414/1; Ex. 129.
135.	RIII 3413/18-3414/1; 3477/21-3478/25; 3479/10-12; 3480/17-22; 3481/ 3-24; Ex. 129.
136.	RIII 3410/21-3411/6; 3411/17-3412/16; 3414/4-14; 3416/6-19; 3453/22-3456/17; Ex. 130.
137.	RIII 2868/17-2869/1; 2870/25-2871/3; 2884/23-2885/7; 2911/9-2913/6.
138.	RIII 2869/2-10; 2870/15-2871/17; 2999/3-25; 3000/19-3001/2; 3001/19-3002/1; Ex. 135.
139.	RIII 3370/4-18; 3371/20-24; 3431/2-3433/24.
140.	RIII 299/2-7; 299/24-300/9; 641/15-642/20; 2288/1-5.
141.	RIII 299/24-301/4; 303/5-20; 479/23-480/8.
142.	RIII 300/17-18; 300/25-301/10; 303/5-20.
143.	RIII 1221/12-1222/20; 3628/1-3630/14.
144.	RIII 1187/11-1188/4; 1188/23-25; 1189/17-20; 1196/20-22; 1197/6-1198/6; 1205/13-24; 1368/21-1369/25; 1370/1-8.

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145.	RIII 1209/1-11; 1214/2-5; 1350/25-1351/1; 1358/13-1359/7; 1370/9-22; 1372/24-1373/22; 1374/19-1375/21.
146.	RIII 1206/14-15; 1208/4-12; 1375/22-1376/1; 1376/22-1377/4; 1399/16-20.
147.	RIII 1010/6-7; 1011/11-20; 1022/19-21; 3002/25-3003/4; 3022/11-17; 3030/24-25; 3031/10-15.
148.	RIII 1243/20-1245/1.
149.	RIII 311/17-313/23 ; 315/1-4; 475/19; 476/24-25; 478/10-11; 543/18-19; 545/22; 551/19; 1246/22-24; 4703/4-8.
150.	RIII 1246/20-1249/18.
151.	RIII 4714/15-21; 5165/14-22; Ex. 147B.
152.	RI 206; RIII 1251/7-1252/6.
153.	Mailings: a) Demand letters from attorney to insurance company: RIII 1526/6-16; 1527/17-24; 2133/20-2134/2; 2243/22-2244/15; 2266/21-2267/5; 3511/17-3512/7; 3534/16-3535/8; Exs. 22, 53, 139; b) Copies of complaint and summons sent to DMV: RIII 964/5-24; 966/21-967/8; 967/25-968/17; 985/1-21; 986/12-21; Exs. 20, 20D, 20H, 20L, 21C, 21D, 21H, 21L; c) Copies of complaint and summons sent insurance company: RIII 923/13-22; 1497/13-20; Exs. 17, 34B; d) Copy of complaint and summons to insured: RIII 2711/12-16; 2751/1-16; Exs. 25, 26; e) Drafts to pay claims: RIII 1503/8-14; 3277/8-11; 3612/6-3613/2; Exs. 34C, 123, 132, 134; f) Application for insurance policy: RIII 3105/2-3; Ex. 140; g) Application to change policy to add car: RIII 905/18-22; 911/8-21; 914/9-10; Ex. 15; h) Request for settlement checks: RIII

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	1504/4-12; Ex. 34C; i) Claim forms: RIII 2729/9-23; Ex. 88F; j) Return of claim forms: RIII 2730/9-12; 2731/19-23; Ex. 88G; k) Release of claims: RIII 927/6-24; 934/4-21; Ex. 18; l) Report of investigation: RIII 933/9-13; m) Contact with out of state insured: RIII 3187/11-14; 3215/1-3216/15; n) Correspondence between attorneys: RIII 3187/15-24; 3215/1-14; Exs. 142, 445A, 445B; o) Doctors reports to attorneys: RIII 4270/11-17; 4391/7-18; 4465/12-18; 4514/9-16; Exs. 466, 467, 468, 469, 477A, 477B, 478A, 478B, 479, 480, 481, 482A, 482B, 482C; p) Standard practice to use mails: RIII 1514/2-9; 2267/10-25; 2587/11-2588/2; Exs. 22, 53, 54, 55, 56.
153A.	RIII 2926/3-4; 2928/19-2930/6; 2957/3-2958/22.
154.	See Reference Numbers 1, 2, 3, 4, 5, 6, 7, 8, 10.
155.	See Reference Numbers 1, 6, 10, 11, 12, 13, 14, 15, 21, 22, 24, 25.
156.	See Reference Numbers 21, 22, 38, 43, 69, 70, 86, 87, 91, 92, 147.
157.	See Reference Numbers 30, 60, 61, 62 And RIII 1044/22-1046/17; 2279/2-3; 2509/14-17; 4772A/9-22.
158.	See Reference Numbers 141, 142.
159.	RIII 267/23-268/4; 269/12-19; 425/22-426/9; 1659/1-14; 1660/6-1662/22; 4454/9-22; Exs. 147A, 147B, 420.
160.	RIII 615/5-16; 717/11-16.
161.	See Reference Number 22.
162.	See Reference Numbers 69, 70, 71.
163.	See Reference Numbers 39, 40, 41, 42.

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164.	See Reference Numbers 1, 10, 11, 12, 13, 14, 15, 25 and RIII 1044/22-1046/17.
165.	See Reference Numbers 41, 48; Exs. 1 p. 2, 11.16-28; 2 p. 2, 11. 15-27; 488.
166.	See Reference Number 45; RIII 630/6-631/10; 4701/7-12.
167.	See Reference Numbers 36, 62, 66.
168.	See Reference Numbers 68, 71, 90, 94, 95, 96, 97, 98, 99; RIII 5014/10-13; Exs. 142, 443C, 445A, 445B.
169.	See Reference Number 71; RIII 5014/10-13.
170.	See Reference Numbers 17, 19, 20, 21, 22, 24; RIII 4995/4-4996/19.
171.	See Reference Numbers 73, 74, 110.
172.	See Reference Numbers 136, 149.
173.	See Reference Numbers 103, 104, 105, 106, 107.
174.	See Reference Numbers 143, 144, 145, 146, 148, 150.
175.	See Reference Numbers 53, 75 and RIII 1421/14-22.
176.	See Reference Numbers 77, 80, 83, 85, 87.
177.	See Reference Numbers 94, 95, 99; Ex. 443C.
178.	See Reference Numbers 102, 103, 104, 105, 106.
179.	See Reference Numbers 143, 144, 145, 146.
180.	RIII 4016; 4598/13-14; 5260; 5463.
181.	RI 14-20; 37; 80; 211; RIII 3686; 3722; 5680; 5689.

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182.	RIII 484/4-487/5; 523/10-530/17; 538/1-541/3; 5181/18-5184/24.
183.	RIII 487/10; 489/18-19; 502/12-15; 503/18-20; 510/19-20; 512/11-15; 514/6-10; 518/5-21.
184.	Concealment evidence: a) Instructions to fake injury: RIII 249/17-24; 267/2-7; 292/10-295/17; 616/25-617/24; 679/21-680/4; 701/12-24; 704/3-9; 765/20-766/5; 781/3-782/7; 1126/16-1127/4; 1733/20-1734/1; 1813/15-1814/22; 3122/9-21; 3362/13-19; 3404/3-9; 3404/25-3405/3; b) Instructions to lie down again at scene: RIII 3367/17-22; 3402/11-16; 3447/2-15; c) Instructions to quit work: RIII 615/5-16; 717/11-16; d) Instructions to damage vehicle: RIII 257/13-17; 446/4-17; 1948/10-12; 2852/16-19; 3362/22-3363/4; 3380/9-14; 3394/13-21; e) Instructions as to report of cause: RIII 764/9-765/1; f) Instructions to keep quiet: RIII 642/12-20; 1244/11-1245/1; 1375/16-21; 1431/23-1432/25; 1756/25-1757/3; g) Instructions to get out of town: RIII 300/6-18; 1251/25-1252/6; 1376/2-13; 1392/20-23; h) Instructions to conceal method of referral: RIII 461/25-462/15; 566/21-567/8; 1770/10-19.
185.	See Reference Numbers 143, 150.
186.	Ex. 147B.
187.	RIII 5199/3-10; 5593/6-8; 5594/19-5595/2.
188.	RI 206, 207, 208, 210, 211, 213, 214, 218; RII 271, 274, 275, 276, 277; RIII 3703/15-24; 3704/8-14. (See also Reference 189.)
189.	RIII 5937/7-22; Supp. RII 4/20-5/6; 23/19-24/2; 2 Supp. R 2/13-24; 20/20-21/3.

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190.	RI 48, 49, 206, 208, 209, 217, 219; RIII 39/12-18; 52/1-2; 65/12-68/25; 69/7-10; 3667/4-25.
191.	See Reference Number 190 and RI 219, 220; RIII 81/13-17; 85/20-86/3; 89/3-4; 93/6-20; 368/16-20; 382/4-383/7.
192.	Supp. RI 65/17-66/9. See also Court's Opinion, Supp. RI pp. 52-54.
193.	Tr. Hrg. I 43/15-16; 221/8-24; 223/22-224/18; 249/13-250/15; Tr. Hrg. II 292/20-294/23; 311/2-312/8. Note. Trial Ct's Opinion, Supp. RI 53/3 contains citation to partial transcript p. 18. The material is found in Tr. Hrg. 43/15-16.
194.	Evidence to Support Contested Findings of Fact:

Finding III: Tr. Hrg. I 62/1-10 (June, 1962; Tr. Hrg. I, 1); 70/10-15; 71/3-8; 71/22-72/16.

Finding V: Tr. Hrg. I 137/7-9; 139/18-141/13; 143/11-15; 147/11-150/23; 165/8-166/3.

Finding VI: Tr. Hrg. I 134/13-136/13; 149/24-150/23; 205/23-206/18.

Finding VII: RIII 6273/18-6274/18; 6276/8; 6277/16-24; 6279/1-2.

Finding VIII: Tr. Hrg. I 43/15-16; 221/8-24; 223/22-224/18; 249/13-250/25; Tr. Hrg II 292/20-294/23; 311/2-312/8.

Finding IX: RIII 6273/18-6279/2; Supp. RI 2/25-27; 4/22-23.

Finding XI: Tr. Hrg. I 249/13-250/25; Supp. RI 65/27-30 (Uncontested Finding X).

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Finding XII: Tr. Hrg. I 197/7-15; 249/13-250/15.

Finding XIV: Tr. Hrg. I 71/22-25; 72/6-10; 205/23-206/2.

Finding XV: RIII 6273/18-6279/2; Supp. RI 2/25-27; 4/22-23; 65/27-30; Tr. Hrg. 249/13-250/25

CERTIFICATE OF SERVICE BY MAIL

M A Y 7, 1964

I HEREBY CERTIFY that on this day there was mailed, via Air Mail, with postage thereon fully prepaid, three (3) copies of Consolidated Brief of Appellee to each of the following at the addresses indicated:

Mr. Dwight L. Schwab
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I FURTHER CERTIFY that the above are the last known addresses of said counsel for appellants and there is at each of said places a delivery service by United States Mail from said Post Offices.

A. LAWRENCE BURBANK

A. LAWRENCE BURBANK
Special Assistant to the United States Attorney, District of Oregon.